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MASTER THESIS

Merger Control in the European Union

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Declaration of Authorship

I hereby declare that I compiled this thesis independently, using only the listed resources and literature. I grant permission to the Charles University to reproduce and distribute copies of this master thesis in whole or in part.

Prague, June 30, 2010 Victoria Moldovanu

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Abstract

The main goal in this paper is to make an in-depth analysis of the regulatory situations that can arise during mergers when political involvement takes place. The research is based on four controversial merger cases of undertakings within the same country (E.On-Ruhrgas), European Union countries (E.On-Endesa, Unicredit-Hypoverein) and between companies from the USA (Boeing-McDonnell Douglas) that have effect on the European market. We analyze the four mergers using Michele Ruta and Massimo Motta models from the paper "A Political Economy of Merger Policy in International Markets" (2008).

By the end of the research we reached the conclusion that due to some lapses in the European Commission Merger regulation at the time of the mergers, as well as due to government involvement in the mergers, they are not always cleared in the benefit of the market competition or consumer welfare, but due to nationalistic interests of governments to have big players on the market or to keep governmental power in certain industries, even with the risk of harming competition. Along with this, from the mergers analyzed here, it becomes clear that local or union authorities scrutinize the foreign acquirers more.

JEL Classification: L4, K21, D78

Keywords: European Union, Merger Control, European Commission Merger Regulation

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Abbreviations

CEE	Central and Eastern Europe
CNE	National Energy Commission
CNME	National Commission on Securities Market
EC	European Commission
ECJ (CoJ)	European Court of Justice (Court of Justice)
ECMR	European Commission Merger Regulation
EEA	European Economic Area
EU	European Union
EUR	Euro
FCO	German Federal Cartel Office
FTC	American Federal Trade Office
GATT	General Agreement on Tariffs and Trade
HVB	Bayerische Hypo-und Vereinsbank AG
M&A	Mergers and Acquisitions
MDC	McDonnell Douglas
NCA	National Competition Authority
OCCP	Polish Office of Competition and Consumer Protection
OLG	Regional Court in Dusseldorf
SME	**S**mall and Medium-sized Enterprises
TSO	Transmission System Operator
UCI	UniCredit Spa
UK	United Kingdom
US	United States of America
USD	United States Dollar

Thesis Proposal

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Proposed Topic	Merger Control in the European Union

It is strongly believed that an efficient economy implies an efficient competition. Merger Control regulations are intended to reduce monopoly and market power under competition law, so that consumers benefit of a great diversity of qualitative products for the lowest possible prices. In the 20th century, regulating mergers has become a global issue. Two of the most influential merger regulation systems today are the European Union (EU) and the United States of America.

Objective: The thesis will reveal the mechanics of the merger control in the EU. It will also try to explain the role of politics in the EU merger control during the evolution of merger regulations; why politicians valued their power to clear or prohibit mergers; and how the merger regulations evolved until the adoption of the European Community Merger Regulation (ECMR 4064/89). With the help of Cournot's oligopoly model and retrospective pre- and post-merger data of merged companies, it will be possible to determine the level of effectiveness of the competition law.

The thesis deals with the following questions:

1. Are the cleared mergers always pro-competitive, and vice versa?
2. How do the competition laws and the political environment influence the merger?
3. Do merger control regulators take into consideration the benefits of the firms?

Hypotheses:

- Horizontal mergers of big companies are anti-competitive.
- Mergers involving foreign acquirers are examined under closer scrutiny.
- Institutional and political environments do matter in the merger controls.
- Firms' interests are not the main priority in merger control decision.

Methodology: We will take specific cases of EU cleared horizontal mergers, collect data and analyze their level of competitiveness judging by the change in consumer surplus and competitors' profits post-merger. By using price data from before and after the mergers, and applying Cournot's oligopoly model, we will be able to determine if the merger control was effective. We will analyze the impact of political and institutional environments on competition law enforced on mergers between EU companies, and on mergers between EU companies and foreign acquirers, by applying a recent model elaborated by Michele Ruta and Massimo Motta in "A Political Economy Model of Merger Policy in International Markets" (2008).

Outline:

1. Introduction
2. Mechanics of EU Merger Control
3. Merger Control Policies Evolution
4. Assessment of Existing Mergers Using Economic Models (Case Study)
5. Conclusion

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Prague, November 3, 2009 **Signature of the Supervisor**

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1. INTRODUCTION

Merger Control in the European Union is a rather new activity intended by the European Commission (EC) to regulate the economy of the Union. Hundreds of mergers have been evaluated under the European Commission Merger Regulation (ECMR) with the goal to protect competition and achieve consumer welfare. The European Commission Merger Regulation, in its two decades of official existence, has gone a long way to achieving positive results in consumer welfare and competition ahead of nationalistic goals of the governments, companies' desires to create monopolies, dictate prices and market policies, and to increase their profits over consumer benefits.

The thesis herein focuses mainly on the political involvement in the European Union Merger Control. It is an issue of great interest and has led to the improvement of European Union Merger Regulation throughout the years. We go through the most important merger policy matters and make a thorough analysis of particular merger cases that reflect best the problems with the political environment in merger regulation.

In chapter 2 of this paper we focus on the milestones of the origins and evolution of European Merger Regulation. There has been a merger trend for years, intensifying in the last decades of the 20th century, thus the intense evolution of the European Commission Merger Regulation. The policies were evolving, the procedures had gotten more complex and the period of assessment became longer, all this to improve the decision-making and protect the competition as best possible.

Chapter 3 covers the mechanics of the European Union Merger Control, thresholds set for mergers in order to be assessed by the European Commission. Here we also briefly refer to the collusion hypothesis and how the coordinated effects can harm competition. We also explain the type of discrepancies that arise between markets and regulators and refer to some researches done on the factors that contribute to their occurrence.

Chapter 4 describes the theoretical model for our research realized in the fifth chapter. We used the model from the research paper titled "A Political Economy Model of Merger Policy in International Markets" by Motta and Ruta (2008). The paper provides models for each type of mergers providing explicit ways of calculating the probability of a merger being endorsed, of government lobbying power, outsiders' and insiders' profits, and consumer surplus.

Chapter 5 focuses on the analysis of four different types of actual controversial merger cases that have had loud echoes in the international press. It reflects the controversial issues of the cases and gives full insight on how they evolved and how the European Commission reacted to governmental involvement in the cases. At the end of each case study, there is a conclusion where Motta and Ruta (2008) theoretical model results are compared with our analysis.

To roughly generalize the findings, by providing the explicit information on the evolution of each case in the mergers studied, it becomes clear that in multinational big mergers governmental involvement is oriented towards defending national giants against ECMR, consumer benefits and market competition.

2. MC POLICY EVOLUTION IN THE EU

"Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services" HMG[1]. Competition allows technological innovation to flourish. The European Commission has wide powers to make sure businesses and governments stick to EU rules on fair competition. Merger Control regulations are intended to reduce monopoly and market power under competition law, so that consumers benefit from a great diversity of qualitative products and services for the lowest possible prices. Two of the most influential merger regulation systems today are the European Union and the United States of America.

Further in this Chapter we will refer to the evolution of the European Commission Merger Regulation, from its beginnings to present time. We will give a closer look to the changes that were most important for the optimization of the merger assessment that have been introduced in the "new" ECMR 2004 Reform.

2.1. Origins of EU MC and the 1989 ECMR

As mentioned in Lyons (2008), before the introduction of the first ECMR in 1989, the Treaty of Rome made no explicit provision for merger control, however the articles 81 and 82 (initially 85 and 86 respectively) were applied to limited extents to mergers (see Council Regulation (EC) No 139/2004). The legal basis of these two articles allowed the Commission certain influence over firms with already dominant position on the market, but the Commission could not stop the firms from merging even if the concentration had potential future dominant position.

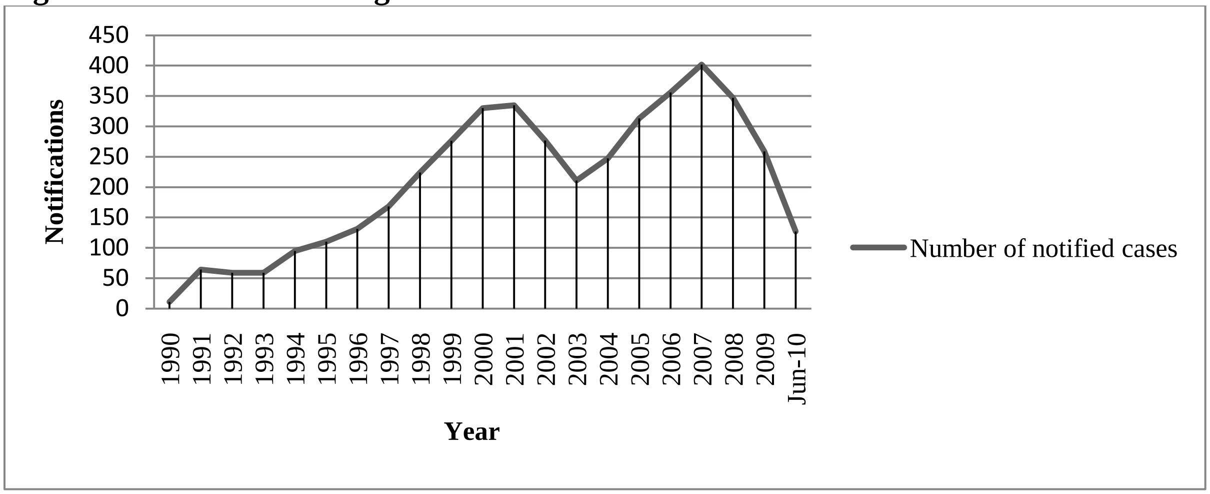
According to Lyons (2000), the Single European Act of 1985 was aimed to create a Single European market by 1992, and put on top of all things the competition benefits. This was achieved with the creation of the Community competence, with it transferring the authority from the member states' National Competition Authorities (NCAs) to the Community institutions.

The eighties saw quite a few mergers, though nothing compared to the beginning of the nineties (see Appendix 1 or Figure 1. for exact data). Thus, Merger Regulation was due to

[1] Horizontal Mergers Guidelines, para 8, OJ 2004/C 31/03

evolve to keep the market under control. The benefits of a union level Merger Control was becoming clearer to the firms also, especially when considering cross-border mergers or the possibility of having a merger voided for breaching Article 81 (Lyons, 2008).

Figure 1. Trend in EU Merger Notifications



Source: Author based on European Commission Competition (2010) available at: http://ec.europa.eu/competition/mergers/statistics.pdf

In the light of the increasing number of mergers proposed in the beginning of the 1990s, European Commission had a lot on its agenda. It was due to assess several mergers in record time, especially with the enlargements that were coming up in 2004 (10 new members) and 2007 (2 new members). It came as no surprise when in 2002, the CFI reversed three of the European Commission decisions: Airtours-First Choice, Schneider-Legrand, Tetra Laval-Sidel (Lyons, 2008). Thus an improvement in the EU merger regulation was necessary and expected. Besides the fact that the reversals put the European Commission in a bad light, something needed to be done regarding the merger Regulation to avoid such situations in the future and have a consistency between the EU Merger Regulators' decisions and further reassessment of the mergers in CFI, as well as between the EU Merger Regulators and National Competition Authorities (Bumgardner, ca. 2005).

Bergman et al. (2003) stated that the "most important effect of the Commission's enforcement of the Merger Regulation is arguably its preventive effect, i.e., that it prevents firms from even notifying mergers that are likely to be blocked". It is an important fact, given the incredible high costs if the merger is to go into phase II (see Chapter 3.1 herein).

According to Article 2(3) of the 1989 Merger Regulation, a concentration (merger) shall be prohibited if it "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it". The concept goes by the name of "substantive test" (referred to also as "dominance test"). The European Court of Justice (ECJ) has defined "dominance" as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independent of its competitors, customers and ultimately of consumers". However in practice, under the "old" ECMR, as Bergman et al. (2005) phrased it, dominance was often found when firm's market share or the two merged companies combined market share exceeded forty percent, though higher markets shares were typically required when the buyers had strong countervailing market power or when entry barriers were particularly low. It also appears that, as soon as dominance was found, very little was required for finding competition to be "significantly impeded".

The 1989 Merger Regulation imposed higher turnover thresholds, this letting to the discretion of National Competitions Authorities the decisions, which might have required Community assessment. Nevertheless, certain mergers falling under the thresholds could be referred to the Commission (Article 22), but the later could refer the case to the appropriate NCA or refuse it in general. This clause was included because some smaller Member States did not have a national merger control that usually made decisions on under-threshold mergers. The inverse was also included in the law. The "German clause" as it was called allowed member governments to lead their own investigation where a prospective merger has substantial effects on a market within a member state.

Generally, according to the 1989 Merger Regulation, most decisions were made based on supporting competition. The "efficiency defence" clause was not part of the "old" ECMR and some cases have been prohibited due to this.[2] A big minus of the 1989 ECMR was the scarcity of qualified economists in different areas of economy who would provide the European Commission with empirical research on the outcomes of the merger. The

[2] For more on "efficiency defence" clause, see Chapter 2.2.

competition economics is a quite new discipline and the assessment tools were gradually evolving. In the next chapter we see that it has changed with the 2004 reform.

2.2. ECMR 2004 Reform

On May 1, 2004, EC has introduced, along with the extension of the European Union by 10 new Member States, a series of changes in the ECMR (formal name of the new Merger Regulation introduced in 2004 is "Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings") that were due to improve the competition decision.

There have been several papers analysing the ECMR from its beginnings and the changes and effects of the new Merger Regulation introduced on May 1, 2004 on horizontal mergers decisions. One of them is the paper by Serdarević (2009) who concludes among other things that "Commission's decisions are not purely explained by the motive of protecting consumer welfare". In the same paper the author also rejects "the claim that the Commission listens too much to competitors at the expense of consumer interest", but most importantly he asserts that "other political and institutional factors do play a role" in the decisions on the mergers. We elaborate on this last conclusion further on in our case study.

Before actual changes were implemented in the "new" ECMR, after ten years from the implementation of the European Merger Regulation, the European Competition Commissioner has welcomed suggestions to the improvement of the Merger Regulation. Then the Green Paper emerged at the end of 2001, opening the discussion on the existing Merger Regulation.

The biggest improvement to the new law is the Horizontal Mergers Guidelines elaborated that identifies specific theories on competitive harm. Three of most ardent ones are the non-coordinated or unilateral effects, coordinated effects (see Chapter 3.3 herein) and the elimination of a potential competitor. The introduction of HMG installed a certain order in the merger control procedures.

The revised ECMR included changes in the procedures of the ECMR, for example, longer time for mergers evaluation, in order for accurate remedies to be elaborated. Besides the extended time for appraisal, the "efficiency defence" was introduced. The main idea behind "efficiency defence" is that while mergers can be anti-competitive, they can also bring efficiency gains[3], the latter however would need to outweigh the former in order for the positive decision to be made (Ilzkovitz and Meiklejohn, 2001). This “efficiency defence” clause was introduced in the HMG[4].

The new regulation brought with it – along with the lower turnover thresholds, raised standards of proof for demonstrating anti-competitive effects and the newly-introduced “efficiency defence” – the inclusion in the process of assessment of a group of ten specialized economists who would execute rather technical analyses for the Commission on the effects of the proposed concentrations. The group leader, the Chief Competition Economist (an academic economist) was named Lars-Hendrik Röller who is the adviser to the Commissioner and the College of Commissioners. This organisational change came very handy to ease the burden on the decision-makers.

Concluding this chapter it is worth mentioning that in the 20 years of its existence the European Commission Merger Regulators has proven mature enough to grow and learn from mistakes (like the CFI reverses in 2002), to improve the policies based on new competition economics assessment tools. Alongside with the regulators, the firms have adjusted to the merger policies and what they imply. The great achievement with the evolution of the ECMR is that the firms have learned to assess the mergers better before proposing them, leading to less anti-competitive mergers initiated and faster reached remedies.

[3] Mergers can yield efficiency gains in several ways: by allowing a better exploitation of economies of scale, economies of scope and learning economies, by enhancing technological progress, by increasing the bargaining power of the merging firms and by improving the efficiency of management (Ilzkovitz and Meiklejohn, 2001).

[4] Horizontal Merger Guidelines (para.76-88).

3. MECHANICS OF EU MC

There are several reasons why companies decide to merge. Generally, as base reasons serve the desire to increase efficiency, to reduce production and distribution costs, to extend markets or become more competitive. The single European market and globalization also makes companies want to merge their activities. However, no matter what are the main reasons for companies to merge, there have always existed certain policies to be followed in the assessment of concentrations' effects on the markets and competition.

While mergers can be beneficial to the economy, some concentrations can reduce competition in a market, usually by creating or strengthening a dominant player. These effects can be harmful to the end customer through higher prices, reduced choice or less innovation. Also, in order for the European Commission to be the deciding authority, the mergers have to have a Community dimension, i.e. the annual turnover of the combined businesses exceeds certain thresholds. The rules apply to all mergers worldwide because even mergers between companies based outside the European Union may affect markets in the EU if the companies are active there.

In this chapter we cover these and a few other issues related to the mechanics of the EU MC. Also, we will further refer to the collusion hypothesis, how the matter has been treated in the merger procedures. We will also shortly cover the types of discrepancies arising between markets and regulators in the process of decision making and the factors that lead to them.

3.1. MC Procedures

ECMR provides specific procedures to be followed by the merging undertakings when they decide to merge. Below we cover some of the most important steps to be followed that are given in the ECMR.

The first step is the notification of the EC which has to take place either after the:

- conclusion of agreement,
- announcement of the public bid or acquisition control, or
- after showing good faith intent to do so.

The notification is made via the "Form CO" with the receipt of the notification Phase I officially starts and it usually takes 25 working days. A negative decision is given within this period if the new concentration does falls within the scope of the Merger Regulation and the merger is approved if it does not present serious doubts as to its compatibility with the common market.

However, if the concentration raises serious doubts, the EC initiates a new phase, called Phase II that starts with the Commission's decision that the concentration presents serious doubts. For the Phase II the decision can be taken in 90 to 125 working days (which is the maximum duration of the Phase II). The decision can be appealed within two months from the day of decision.

In case of an appeal the decision can be reviewed by the European Court of First Instance and ultimately by the European Court of Justice. In European Commission's "the EU Competition law - Rules applicable to Merger Control" it is stated that "the legal procedures in these last two instances can extend the time of the merger by a few years, that is why in the second phase the EC can make the undertakings agree to certain concessions in order for the merger to be approved" (2010d). In case the concentration does not respect the imposed conditions, the Commission reserves itself the right to set fines of up to 10% of the aggregate turnover of the merging firms. [5]

It is worth mentioning here that with the evolution of the ECMR the mergers would mostly be proposed if they are pro-competitive and efficient for the merging parties (Lyons, 2008). In this way, even though the procedures have become more oriented towards giving a good decision in the end, no matter if it is achieved in the first or second phase of the analysis, or if in order to allow it remedies have been imposed, the merging firms now tend to evaluate the potential outcome of the concentration to be created a lot better prior to proposing the mergers and put forward mergers that would be accepted. And that is no wonder, because when it comes especially to giant mergers, time is very valuable, and the companies would rather not waste time and resources on a merger that will more likely not be endorsed by the European Commission.

[5] For a more detailed merger control procedures see the Council Regulation (EC) No 139/2004.

3.2. MC Thresholds Requirements

The limitations in EC jurisdiction in merger cases are imposed by the Community dimension which sometimes leaves out important domestic mergers that create concentrations influential on the whole European market. The thresholds imposed leave important mergers to the discretion of the National Competition Authorities. The later has been proven in many cases (some of which are analyzed herein, see Chapter 5) to be oriented towards creating “national champions” rather than decide on the mergers based on the new concentration’s effects on the domestic and European competition.

According to the ECMR (Council Regulation (EC) No 139/2004), a concentration has a Community dimension if:

- the combined aggregate worldwide turnover (from ordinary activities and after turnover taxes) of all the undertakings concerned (in the case of the acquisition of parts of undertakings, only the turnover relating to the parts which are the subject of the concentration shall be taken into account with regard to the seller(s)) is more than EUR 5 000 million (special rules apply to banks), and
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless
- each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

In case these thresholds are not met, a concentration has still Community dimension, if:

- the combined aggregate world-wide turnover of all the undertakings concerned is more than EUR 2 500 million, and
- in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million, and
- in each of at least three Member States included for the purpose of the second point above, the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million, and
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless

- each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3.3. Collusion Hypothesis

As far back as the 1960's has the collusion hypothesis been researched and debated. To be more specific, we will shortly explain what the collusion hypothesis is, what is required for sustained firms' collusion, how the EU law covers it and what is being done against the collusion of the firms.

There was a paper in 1964 by George Stigler that provided results proving that the number of companies in the market is by far not the most important factor leading to coordinated effects. The logic of coordinated effects is based on the economics of tacit collusion. One of the methods of collusion is the outright merger (Stigler, 1964).

As Eckbo mentioned in his 1982 paper "under the collusion hypothesis, rivals of the merging firms benefit from the merger since successful collusion limits output and raises product prices and/or lowers factor prices". Collusion enables firms to exert market power they would not otherwise have and restricts competition. Fighting collusion is a major area of activity for any antitrust authority. In particular, this point is addressed in merger cases (Dargaud, 2007).

Ordover (2008) has outlined brilliantly that what has started with Stigler's (1964) paper, economists and antitrust authorities worldwide have elaborated on and reached certain conclusions. According to these conclusions effective tacit coordination requires that the potential coordinators can reach an agreement on how to suppress competition, quickly and precisely detect deviations from the agreement, that they can impose effective punishments on deviating firms, and that the collusive outcome is not destabilized by outside economics factors (new entrants, customers, non-colluding firms, other external shocks).

From the multitude of papers analyzing the collusion hypothesis, Dargaud (2007) suggests that most of them tend to give full credit of collusion sustenance to the minimal discount factor threshold. However, the results of the paper show that firms' ability to collude does not necessarily mean they will succeed in their collusion.

The reduction of the number of firms in one industry, tends to draw with it higher risks of collusion. Still, as mentioned above, there are a lot of implications to the collusion process, and not all the companies may agree to collude from various reasons, for example some firms would prefer to gain more than the collusion level would offer. The collusion of firms is an issue continuously researched for at least half a century, and newer and more sophisticated tools to assess the phenomenon become available. Nonetheless, one important thing that has recently been researched is the complexity of the assessment of mergers' "potential joint-dominance effects", and according to Dargaud (2007) "the impact of the merger depends on the nature of the firms involved". The results from the same working paper by Dargaud (2007) suggest that the competition authorities "have to approve, under certain conditions, a merger of two 'big' firms in order to fight collusion. But when small firms want to merge, the risk of collusion is increased." Or, as Lyons (2008) has suggested, "[...] the same benefits of a strong rival are not relevant if coordinated effects are at issue, in fact quite the opposite".

In the 1990's the EC has used the collective dominance or coordinated effects in its prohibiting decisions on several mergers, amongst which Airtours/First Choice later on reversed by the CFI. The concept however was only starting to be thoroughly researched and confidently used since 2002 and was officially introduced in the HMG under "coordinated effects"[6].

3.4. Discrepancies between Markets and Regulators

The main idea behind this concept is that though at times the markets anticipate some mergers as pro-competitive and are expected to be cleared when in fact, due to some reasons we will refer below, they are prohibited (type I discrepancies), and vice-versa, when a market anticipated anti-competitive merger is cleared (type II discrepancies). In this subsection we will refer to researches that have been done in the matter and to the achieved results.

On the eve of a revised Merger Regulation, Neven and Röller (2002) have made a research on the topic of discrepancies between markets and regulators in the first 10 years of ECMR. In conclusion they came up with regulation improvement suggestions (like the introduction of the "efficiency defence" – one of the major changes to the ECMR introduced with the 2004 Reform). The discrepancies analyzed here are between EU decisions and the stock

[6] Horizontal Mergers Guidelines (HMG), para. 39-57.

market anticipations. The problem with this kind of ex-post researches is that the anticipated decisions can be different from the actual decisions, and the ex-post review of the decisions does not give totally accurate information. Plus, the Commission makes optimistic assumptions regarding efficiencies benchmark level (good indicator why the Commission endorses certain anti-competitive mergers and not others). The analysis requires a comparison between the "actual market developments induced by the decision with the developments that would have taken place otherwise". The main conclusion reached by Neven and Röller (2002) is that the lack (at the time of research) of the "efficiency defence" clause in the Merger Regulation is a significant source of discrepancies, also political economy of merger control matters for correct decision making, while there is not consistent evidence that the role of competitors is important towards the type I discrepancies.

Another more recent research on the discrepancies between markets and regulators using stock market data on the day of announcement of the mergers is the paper by Serdarević (2009), where he used an econometric model[7] and included variables for the factors that in his opinion might influence mostly the antitrust agency's decisions (factors like: power of competitors, institutional factors, procedural issues, preference for domestic firms and finally the effect of the 2004 Reform). The empirical research showed amongst other things that there is no significant influence of competitors on the EC decisions; type II errors probability is higher in Phase I, while decisions taken in Phase II tend to bear unnecessary remedies; for mergers from large EU countries the probability of bearing unnecessary remedies is lower, however there is no evidence of type II errors; and that the 2004 Reform had a positive impact showing that the probability of type II discrepancies occurrence decreases by approximately 20 percent[8].

The researches herein can be indicative of the real cause of discrepancies; however, one should bear in mind the shortcomings of using post-merger data.

[7] The model used is based on the theoretical framework of Neven and Röller (2002).
[8] For more detailed results of the research, see Serdarevic (2009)

4. THEORETICAL MODEL USED FOR MERGERS ASSESSMENT

In this part of the thesis, we will explain the political economy model of Merger Policy in international markets elaborated by Motta and Ruta (2008). This model was generated due to various cases of mergers that caused conflicts between decision makers and politicians involved in the mergers. The model is under the assumptions that the decision makers in merger policy are antitrust authorities who tend to maximize welfare and which are subject to lobbying of firms and governments.

Further on we investigate the determinants of governments' and authorities' attitude regarding certain mergers, also find out why some mergers are favoured and others are not. With the help of Motta-Ruta theoretical model we analyze the merger policy on international markets.

4.1. Description of the Model and Main Results

The model economy consists of two regions with no trading costs between them, and only three firms active in the industry are used for simplicity. If there were only two firms, the merger would create a monopolistic position and we would not be able to analyze the effect of merger on the outsiders, which is essential in understanding the potential political biases towards mergers.

The two firms merging are called "insiders" (denoted with *I*) and the entity they create is larger, possibly more efficient and reduces competition in the market. If the efficiency gains from the merger are large enough, the equilibrium price falls, benefitting the consumers but hurting the competing firm, herein called "outsider" (denoted with *o*). The aggregate effect of a merger is the sum of the change in consumer surplus and the change in profits of insiders and outsiders.

A merger is considered efficient if it improves aggregate welfare by having sufficiently high gains through higher combined positive effects on consumers and insiders that dominate the negative effect on the outsiders. The institutional environment in which the policy is decided is essential to understand the political economy of the merger policy.

There are two dimensions relevant for our study, the international dimension of the merger and the legal or political environment in which the merger policy is decided. The merger can be made within the same country (autarky), between companies of two independent countries (further on referred to as non-EU members), and between firms from countries that are part of an international union (herein referred to as EU mergers). The EU/non-EU region examples are used for illustrative purposes. The model we explain here holds in general and is applicable to mergers from any country. Since the relationship between antitrust authority and government depends on institutional factors, we will consider that the decision of antitrust can be influenced by the government with some exogenous probability (ε_U) like the implicit political influence on the members of the authority. With this probability positive, firms may want to pay contributions to politicians to influence government's decision on the merger.

The exogenous probability of the government to decide on the merger is $\varepsilon_U \in [0;1]$. If ε_U=1, the government basically decides whether to allow or prohibit the merger, while if ε_U=0, then the antitrust authority is the only decision maker.

In equilibrium, government's actions can be influenced by lobbying to accept or reject a merger, and we will see if the model shows whether the government is capable or not of approving inefficient merger entering this way in conflicts with the antitrust authorities.

One important matter to be noted is that even though there may be only one decision maker (for example, the EU Commission, in our illustrative cases) that officially has the power to allow or prohibit the merger, the governments of member countries can intervene and affect the outcome of the merger. We will proceed by describing the model for each type of merger individually.

4.2. Autarky

This section has autarky as a target. We will describe the economic setting and then introduce the political economy model and analyze the merger policy in a closed economy.

Supposing there is region A and B with a total population of 1. We assume that the location of the firms and ownership coincide, for example, a firm in region A or B belongs entirely to the individuals in that region. Each individual possibly has income from the profits of the firms. Those who own claims on the profits of these firms have a greater interest in the merger policy than just regular consumers.

Assuming that two out of three firms that produce the same good could merge and form a larger entity, we will go on and analyze the effects of merger on *welfare*, *consumer surplus* and *profits.*

4.2.1. Welfare Effects of a Merger

First, we look at the effects of aggregate ("union") welfare. The assumption that firms set quantities makes the model very simple, while assuming price-setting firms with differentiated products would not change the nature of the results (for a formal proof, see Motta, 2004). We assume that each firm has marginal cost guaranteeing that the outsider will never go out of the market, even with maximal efficiency gains of the insiders, and that the merger may lower prices.

A merger between two firms reduces competition in the industry. By merging, the insiders can combine their assets and gain in efficiency, in this way they would operate at a lower unit cost (*ec*), where $e \in [0,1]$ – efficiency gain, the lower the *e*, the larger efficiency gains in terms of lower costs.

We need to check if the merger is profitable, i.e. if the profits of the new firm after the merger are larger than the sum of the profits of the two individual firms. A merger would obviously not be proposed if it was not profitable.

The outsider makes higher profits when after merger the equilibrium price goes up, consequently the outsider loses from merger when consumers gain from it, and vice-versa.

The consumers benefit from the merger only if the price is lower and the price decreases, and only if the efficiency gains from the merger are sufficiently large. And a merger increases consumer surplus if $p^N - p^M \geq 0$, where *N* represents non-merger, *M*-merger, *p*-price.

The effect of a merger on aggregate welfare is the sum of the effects on profits and consumer surplus.

Figure 2. The Effects of a Merger on Profits of Insiders, Outsiders, Consumer Surplus and Aggregate Welfare

0	$\boldsymbol{e_{CS} = e_{\pi o}}$	$\boldsymbol{e_W}$	$\boldsymbol{e_{\pi I}}$	**1**	$\boldsymbol{e} \rightarrow$
	$\pi_I \uparrow$ $\pi_o \downarrow$ CS ↑ W ↑	$\pi_I \uparrow$ $\pi_o \uparrow$ CS ↓ W ↑	$\pi_I \uparrow$ $\pi_o \uparrow$ CS ↓ W ↓	No merger takes place	

Source: Author based on Motta-Ruta (2008)

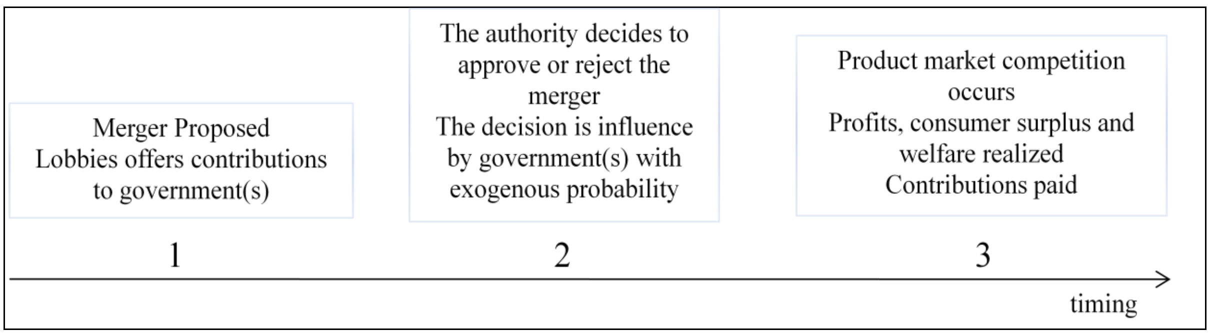
4.2.2. The Institutional Environment

For the simplicity of the model, the case when the antitrust authority approves the merger with remedies is not taken into account. The merger policy is formally defined by *x* where *x* is the outcome, $x \in [0,1], 1 - \mathit{reject\ merger}, 0 - \mathit{allow}.$ The price of the good *p(x)* is the equilibrium price; if the merger is rejected it is *p(1)*), and if it is approved it is *(0)*.

The assumption here is that in order for a merger to be effective, it has to be approved by a welfare-maximizing authority in charge of the merger policy, the decision of which however can be influenced by the government with exogenous probability. The political economy of antitrust policy takes place in three stages, first the merger is proposed and lobbies representing interests of insiders and outsiders may offer political contributions to the government, depending on their position regarding the proposed merger. Then the antitrust authority decides whether to approve or reject the merger. The merger policy can be determined by the government with some exogenous probability, but the lower the probability, the lower the influence of the political environment on the antitrust decision. In the third stage the product market competition takes place, political contributions to the government are paid and consumer surplus and welfare are realized. Each one of these steps is shown in the Figure 3 below.

We model the interaction between firms and politicians. In this setting the political contributions consist of direct monetary transfers to the government. It is assumed that business owners are politically organized and capable of lobbying politicians for favourable policies, while the consumers are seen as having weak incentives to influence the merge policies due to the small part of their budget the good generally takes. Hence, depending on the amount of contributions, the benevolence of the politicians (parameter $\eta \in [0,1]$) is determined. The lower η, the greater weight is given by the government to contributions relative to social welfare (w_U(x)). *Benevolent* government (i.e. if the government is for welfare maximizing mergers) is considered when η=1, and *politically motivated* (i.e. the politicians are interested in contributions since they can be used for electoral campaigns) – for η=0.

Figure 3. Timing of Events



Source: Author based on Motta-Ruta (2008)

Consequently, if the government plays no role in the antitrust decision, firms have no reason to lobby politicians, and have maximal incentives to exert pressure on the government when the latter is the decision maker.

4.2.3. The Political Economy of Merger Policy under Autarky

$$x = \begin{cases} x_U^G \; with \; probability \; \varepsilon_U \\ x_U^A \; with \; probability \; (1-\varepsilon_U) \end{cases}$$

We will now use the model to study the political economy of merger policy under autarky, i.e. when the regions *A* and *B* are in the same country with no effect over the national borders, with a single antitrust authority and a national government. First we will observe the decision of the antitrust authority and then analyze the option of the government. The authority clears a merger only in case it improves the aggregate social welfare ($w_U(0) \geq w_U(1)$), meaning that only mergers that produce sufficient efficiency gains ($e \leq e_U^A = e_w$) are endorsed by the authority, and the rest ($e \; > e_W$) are opposed.

We will study two cases. First, when there are efficiency gains at least as high as to profit the outsider ($e \leq e_{\pi o}$), the insiders and outsiders will both benefit from the merger and lobbies of both will exert pressure on politicians to have the merger approved. If the merger is efficient ($e \leq e_w$) a politician would endorse it without pressure. While if the merger is inefficient ($e > e_w$), and the authority opposes the merger, the lobby gains are set higher, so that the government contests the decision. The political contributions are therefore set so that the government is indifferent to support or not the merger. The government efficiency threshold value (e_U^G) above which firms do not find it advantageous to lobby can be determined. Thus, due to political pressure from lobbies of industrial interests, politicians endorse some mergers opposed to the authority on the basis of welfare criteria ($e_U^A < e \leq e_U^G$). The higher the weight of political contributions set by the government, the larger the bias and the greater the probability that the government can influence the merger decision. If the government does not care about the political contributions ($e_U^G = e_U^A$), or if it cannot influence the antitrust decision, then no lobbying takes place.

The second case is when the efficiency gains from merger are strong ($e < e_{\pi o}$) and insiders and outsiders will have opposing interests and will lobby in different directions. The insiders will try to lobby for the clearance of the merger, and the outsiders for its rejection. The government always supports the merger from two reasons: first, the consumer surplus is larger if the merger is approved when the efficiency gains of the consumer surplus is equal to efficiency gains from the merger which is higher than the efficiency gains without the merger ($e < e_{\pi o} = e_{CS}$); second, insiders' lobby can always offer higher contributions than that of the outsider.

4.2.4. Result

The issues in this section arise between the decision makers in merger policy of mergers with national component. When the authorities are interested in aggregate welfare produced by the merger, they will oppose if the merger does not create sufficient efficiency gains, or produces higher losses for the consumers than gains to the firms. If the government is sensitive to lobbying, then the merger would be cleared since it is not so detrimental to welfare, and all firms gain from the merger anyway.

A final note is that if we were to analyze from the consumer standard point of view of the authority, then the logic would not change, there would only be two main differences: the authority would reject some efficient mergers, not taking into account the merged firms' profits, and the disagreements between government and the antitrust authority would happen for a wider range of efficiency gains levels.

4.3. International Mergers, I: Non-EU Mergers

$$x = \begin{cases} x_B^G \; with\; probability\; \varepsilon_B \\ x_B^A \; with\; probability\; (1-\varepsilon_B) \end{cases}$$

An important matter to be taken into account is a merger of firms from regions other than that of the market. This is due to possible differences in antitrust policies in the respective regions.

Suppose now that A and B are countries open to trade and independent politically, each with a national welfare maximizing antitrust authority and a politically motivated government that can influence the decision of the authority. The location of the firms and consumers now matters. The merger has different effects on country A and B (suppose that insiders are located in country A, while outsider and the market are in country B). Assuming that country B is the EU and A is outside the EU, the merger in A has opposing effects on consumer surplus and profits of the outsiders in B. When the merger efficiency gains are high ($e \leq e_{\pi o} = e_{CS}$), the prices fall and consumer surplus rises, while profits of the outsider fall. The opposite happens for low efficiency gains ($e > e_{\pi o} = e_{CS}$). Also, some efficient mergers in B will be rejected ($e_B^A \leq e_w$), since they do not internalize the effect of the merger on insiders' profits. There is a probability that the government in B will influence the decision, and only the outsider (domestic firm) can lobby the government. If the efficiency gains are low ($e > e_{\pi o}$), from the perspective of B, the merger is inefficient, but is efficient for the outsider. Thus the outsiders may choose to lobby national politicians to support the merger. If the efficiency gains are high ($e \leq e_{\pi o}$) from the point of view of country B, the merger is efficient, but the outsider loses and may lobby the government to oppose the merger. So, if the government of country B is benevolent, politicians do not care about political contributions and outsiders have no incentives to lobby and no conflict arises with the antitrust authority. Any merger with high efficiency gains ($e \leq e_B^G = e_B^A = e_{\pi o} = e_{CS}$) would be endorsed by the authority and the government in country B. For low efficiency gains ($e > e_B^G = e_B^A = e_{\pi o} = e_{CS}$), the opposite is true.

For a politically motivated government in B, politicians are very sensitive to political contributions, and the outsider can always set a positive payment on the policy option it prefers, to support or oppose the merger and induce the government to behave as it wants.

4.3.1. Result

To sum up, there are two contrasting effects on social welfare in country B, namely for high efficiency gains of merger in country A the outsider loses while consumers gain, the later effect always dominates therefore the welfare-maximizing authority in B supports the merger. However, authority in B endorses fewer mergers than what would be the optimal for aggregate welfare since it does not internalize the effect on the profits of the insiders. The government in B is subject to lobbying by the outsider. If the government in B is politically motivated and the legal and institutional environment allows political influence on the merger policy**,** the government in B can always be induced by the outsider to oppose the decision of the authority. Potential severe conflicts are between the different decision-makers given that the cases when mergers harm national welfare coincide with the ones when the national profits increase, and vice versa.

4.4. International Mergers, II: EU Mergers

$$x = \begin{cases} x_A^G \; with\; probability\; \varepsilon_A \\ x_B^G \; with\; probability\; \varepsilon_B \\ x_U^A \; with\; probability\; (1 - \varepsilon_A - \varepsilon_B) \end{cases}$$

We will consider now that countries A and B as part of an international union (e.g. EU), with a single antitrust authority. The two types of mergers we will consider have different features, they are domestic (with merging firms located in the same country) and cross-border mergers (firms merging located in different countries).

Since the union authority maximizes aggregate welfare ($w_A^G(x) = w_A(x)$ and $w_B^G(x) = w_B(x)$) it will endorse the merger with aggregate welfare higher than the efficiency gains ($e \leq e_U^A = e_W$), and oppose it otherwise, independently of the type of merger. This is not the case for governments of country A and B, so we need to address these cases separately.

4.4.1. Domestic Mergers

The location of the consumers and firms influence the national governments of the merger, therefore, assuming that consumers are located in country B we follow the previous section and consider the political biases when there are benevolent governments interested in maximizing national welfare, and politically motivated governments, who care only about lobbying contributions.

4.4.1.1. Benevolent National Governments

First of all, no lobbying takes place, since the governments are not interested in receiving political contributions. Government of country A only takes into account the effects of the merger on the profits of the insiders. Both insiders are located in country A, and the market is located in country B. Whenever the merger is proposed because it is profitable to insiders, the government in A endorses the merger. The effect of consumer surplus always dominates on the effect of outsider profits; therefore the benevolent government in B will endorse the merger if and only if the consumer surplus is high ($e \geq e_B^G = e_{CS} = e_\pi$).

4.4.1.2. Result

Due to the fact that sometimes the welfare objectives of the domestic and union authorities differ, various conflicts may occur. Such conflicts would disappear if the governments or authorities had consumer surplus rather than welfare as their objective function, but they would reappear later on in this section. The above model helps us understand why there should be a supranational authority that should decide on the merger. Since overall welfare of the union must be taken into account, this would avoid that a national government blocks a merger that is beneficial to the Union as a whole.

4.4.1.3. Politically Motivated National Governments

In this part we look at the governments when they only care about the political contributions and do not care about the effect of the merger on the consumer surplus. Therefore the location of the market is irrelevant and lobbying is always successful. While the firms will set their positive contributions on the policy option they prefer, the politically motivated governments will follow the specific interests shown. If the merger is efficient ($e \leq e_{\pi o}$), insiders in country A benefit from merger and they lobby government A for endorsement. The outsider in B loses from the merger for low efficiency gains and lobbies government B for rejection. If the merger is approved and the efficiency gains are sufficiently high ($e_{\pi o} <$

$e \leq e_{\pi I}$), both the insiders and outsider would benefit from the merger, if it were approved. Therefore, they can set certain levels of contributions and try to entice governments A and B to endorse the merger.

4.4.1.4. Result

Even in this case, when the governments are non-benevolent, efficient mergers are likely to be approved. However, the probability of this happening is lower when the merger is more efficient. Still politically motivated governments cause more damage when mergers are inefficient, because due to the opposition of national governments, mergers are less likely to be blocked. The key in this case is the probability that national governments can influence the antitrust decision.

4.4.2. Cross-Border Mergers

The mergers referring to this section are the ones who have their insiders located in different member countries of the union. Though from an aggregate point of view, a cross-border merger is equivalent to any domestic merger, it differs from the previous case from a political economy perspective and from the point of view of national social welfare maximizers.

Suppose we have a set up, where the firm 1 in country A and firm 3 in country B propose a merger, and the outsider is firm 2 located in country A. An important detail here is how the profits generated by the merger are divided between the insiders. We assume that the insiders have equal bargaining power and study the effect of the merger on social welfare, and then we discuss the merger case for benevolent and non-benevolent national governments. To keep it simple, we will deal with the case when the whole market is in country A.

4.4.2.1. Benevolent National Governments

The welfare in country B corresponds to the profits of firm 3, the insider, when the national governments are social welfare maximizers; that is why government B will endorse all mergers ($e \leq e_{\pi I} = e_B^G$), since any proposed merger must be profitable for the insiders. This implies that some inefficient mergers will also be endorsed by government B.

The country A situation is more complex, since there are more interests present: consumers, the outsider and one of the insiders. For any merger (when $e \leq e_{\pi o} = e_{CS}$) the benevolent government in country A would endorse the merger as the increase in consumer surplus dominates the fall in the profits of the outsider. The government in A will support a cross-country merger if and only if $w_A^G(0) \geq w_A^G(1)$, which is true for $e \leq e_A^G$. Still, the benevolent government in A will surely be induced to oppose at least some efficient mergers, as it is only concerned of maximizing the welfare in A. The threshold level of efficiency gains in A is the same as for Union, except for the one term representing the merger on firm 3, the other insider.

4.4.2.2. Result

In this section we have the cross-border "EU merger", one insider in B, the outsider and the market in A, and benevolent governments. The union authority, the governments in A and B endorse the efficient merger, if the merger is profitable to insiders. The government of B will endorse an efficient merger while the government in A opposes it, despite the positive effect on domestic profits, because the increase in consumer surplus is not sufficient. The union authority and government A oppose the inefficient (to them) merger while government B favours it, so the merger will be blocked. The merger will not be proposed if it is unprofitable for the insiders.

4.4.2.3. Politically Motivated National Governments

In this section the effects of the merger on consumer surplus is not taken into consideration, so the location of the market does not matter. Government B will always be induced by the insider to endorse any proposed merger ($e_B^G = e_{\pi I}$). In country A, the situation is a bit more complex, since there are levels of realized efficiency gains for which the insiders and outsider have opposing interests. For low values of efficiency gains ($e < e_{CS} = e_{\pi o}$) the outsider has an incentive to lobby government A to oppose the merger while the insider in A exerts political pressure for approval, making the bargaining power of the insider crucial. Depending on the profits share of the firm 1 in A, the outsider may outbid the insider when a conflict arises (for $e < e_{\pi o}$). For instance, suppose the insider 1 has no bargaining power, in this case insider's profits in A increase will be zero. A politically motivated government in A will oppose the efficient cross-border merger because of the opposition of the domestic outsider. Note that the lower the bargaining power of firm in A, the lower is the payment that this firm can offer to the government at first stage of the game. A threshold value for the bargaining power can be found, so that the outsider can always outbid insider, and induce government A to follow its wishes.

4.4.2.4. Result

Mergers that involve high efficiency gains should be favoured by the national government in the country where the market and the outsider are located, in our case country A, if economic considerations were determining the decisions. However, the opposition to efficient mergers in A can instead be explained by "political" motivations, i.e. lobbying for the insiders who would lose from the merger.

4.5. Conclusions

The framework was elaborated by Motta and Ruta (2008), to study the political economy of merger policy and interpret the existing opposed merger cases between different institutions and different countries.

This model is robust to changes in the objective functions of the antitrust authorities. If the model had been made on a consumer welfare basis, not on the total welfare, most of the results obtained would be qualitatively unchanged and the biases between authorities and governments would be increased. Still if we were to believe that the objective function of antitrust authorities and benevolent government is consumer welfare, the only way of explaining the opposing views of the international merges would be through a political economy approach, where profits earned by firms explain lobbying and eventual political pressure for or against a merger.

We use this model further in this paper to analyze existing merger cases in dependence of their location of the market, insiders and outsiders, the political economy of merger policy, and the general institutional and political environment in which the mergers to be analyzed took place.

5. MERGERS - CASE STUDY

Further on in the case study, with the help of the publicly available reports and information, we will briefly describe a few merger cases proposed relevant for our study. Our cases will have in common the fact that they have been subject to various interventions before being endorsed, or rejected for that matter. The controversy of these cases mostly comes from the divergence of interests of the deciding authorities of the parts involved, the diversity of political economy of merger policy across countries and other reasons, as we will show herein.

We will make the description from the perspective of the time of the notification of the respective concentrations, in order to be able to judge the decision given the available data at the time of the decision. Also we will provide in the background of the companies the information available about each company in part before and after the merger.

5.1. Case 1: E.On-Ruhrgas Merger (Autarky)

5.1.1. Executive Summary

The German energy market has been in process of restructuring and liberalization since 1999. European Union has been encouraging liberalization, and while energy companies were trying to consolidate locally or even to reach outside of the country to do so, the European antitrust regulators were unhappy with the slow manner in which it was happening on national level (Andrews, 2002). The biggest move on the German energy market however has been the attempt of E.On - Germany’s largest electricity supplier, second largest in the world – in the middle of 2001 to acquire 60% of Germany’s main gas utility company Ruhrgas AG. In the following section we will show how different German competition authorities intervened in order to decide whether or not to allow the merger. As Lieb-Dóczy (2002b) state, it is namely about German Cartel Office (FCO) and the Monopolies Commission along with other energy trading firms who expressed themselves negatively and tried to block the merger on competition reasons, while the German government cleared the merger in its attempt to create a “national champion” in the energy sector in order to have a powerful national player that would compete internationally. The merger has been put on hold a few times from various reasons, eventually being endorsed and completed. We will elaborate on these and other issues below.

5.1.2. Case Background

5.1.2.1. Operation

E.On, in the energy market liberalization fever, has shown its intentions to become a majority owner in Ruhrgas by buying its stake step by step. It planned to make a deal with a BP subsidiary Gelsenberg. The latter has agreed to exchange its controlling stake in a company that owns 25% of Ruhrgas for E.On's network of gasoline stations in Germany. Then E.On would buy Bergamann that is owned by a melange of industrial and energy companies, and holds 34% of Ruhrgas (Andrews, 2002).

Table 1. Timeline of E.On-Ruhrgas Merger

Date	Event
2000	E.On shows intents to buy Ruhrgas
July, 2001	E.On buys 25.5% of Ruhrgas stake
December 11, 2001	FCO extends evaluation period on E.On-Ruhrgas concentration
January 20, 2002	FCO blocks E.On’s acquisition of 25.5% stake of Ruhrgas held by BP
February 26, 2002	FCO blocks E.On’s acquisition of Ruhrgas majority stake
May 29, 2002	Public hearing on the case with the parts involved (companies, industry associations and trade unions)
July 5, 2002	E.On-Ruhrgas merger approved by government with conditions
July 13, 2002	German high court puts injunction on the merger due to Ampere and Trianel complaints
July 24, 2002	Hearing with all involved parties
August 5, 2002	E.On and Ruhrgas file complaints against FCO decision
September 5, 2002	New hearing with all the parties
September 19, 2002	Government approves the merger again with new stricter conditions
September 22, 2002	General Elections in Germany
December 12, 2002	Final Hearing at the OLG (Regional Court in Dusseldorf)
January 31, 2003	The nine plaintiffs withdraw complaints against merger after settlements
March 7, 2003	Merger complete, E.On owns 100% of Ruhrgas

Source: Author based on articles from www.factiva.com

The first acquisition is made by E.On in July 2001 when it buys 25.5% of Ruhrgas stake from BP's Gelsenberg subsidiary, acquisition was due to FCO investigation. Along with the planned acquisitions, E.On planned to buy 20% more of Ruhrgas stake as part of its strategy to dispose of non-core business in favour of energy activities. In the period of the merger, Ruhrgas accounted for 60 percent of all sales, with the other competitors Wingas, Thyssengas, VNG and BEB (Eckert, 2001a).

E.On has completed its EUR 10.2 billion buy of gas giant Ruhrgas and on March 7, 2003 owned 100% of the company. E.On has secured the buy of a 40% stake in Ruhrgas previously owned by Shell, Exxon Mobil and Preussag. E.On became owner of a 20% stake in Ruhrgas previously owned by RAG AG and had already owned a 38.5% stake in Ruhrgas, which it bought from other parties like Vodafone and BP PLC's holding company Gelsenberg. The acquisition of Ruhrgas by E.On turns the latter into Europe's third-biggest gas company (Richter, 2003e).

5.1.2.2. Parties

E.On is German and operates in the energy, telecommunications (controls Connect Austria), real estate and chemicals sectors. It is the largest electricity and gas firm in Germany, as well as in the United Kingdom where it controls Powergen. The company's strategy consists in concentrating its assets in electricity and gas – while continuing to control firms in other sectors – and to focus on verticalizing (generation, transmission and distribution) (Leite et al., ca.2006).

E.On was formed through the merger of VIAG AG and VEBA AG in 2000. VIAG AG and VEBA AG were initially founded in the 1920s. VIAG was specialized in aluminium, electricity, and nitrogen, while VEBA focused on coal and petroleum exploration and production. Both companies grew rapidly and prospered during the armament years before World War II and during the war as companies operated by the German Reich. During the post-war years of occupation by the Allies and oil crises of the 1970s they struggled financially. Nevertheless, in the 1980s, the two companies privatized and diversified along similar timelines to emerge as prosperous conglomerates encompassing aluminium, energy production, telecommunications, chemicals, and upstream and downstream oil industry. By the late 1990s, it was no longer profitable to compete in so many areas, so VIAG AG and VEBA AG merged to become E.On.[9]

Ruhrgas is Germany's largest gas firm, dominating the German market with approximately 60% of supply. In addition the firm has the most extensive network of gas pipelines, which carry imported gas into Germany from countries such as Russia and Norway, and more gas storage capacity than any other player on the German market (Leite et al, ca. 2006). At the grid gas level Ruhrgas' market share in the supply of gas distributors, i.e. excluding the direct supply of bulk buyers, is at least 88 per cent in the company's distribution area. Moreover, Ruhrgas is the only grid gas company with dominant access to all gas production sources relevant for supplying the German market (Norway, Russia, the Netherlands, Great Britain, domestic sources). It has the largest grid gas network which gives it top access to both suppliers and buyers. Moreover the company has the largest storage capacities in absolute numbers which are significant for balancing fluctuations in sales (Federal Cartel Office, 2002).

The success of Ruhrgas has coincided with the growth in the use of natural gas in Europe since World War II. With the discovery of new natural gas reserves in northern Germany, Siberia, and the North Sea in the 1950s and 1960s, along with growing public awareness of the environmental importance of burning cleaner fuels, natural gas emerged as a leading alternative to other fossil fuels. During the period of German reintegration, Ruhrgas was a major player in the transformation of East Germany's centralized energy industry into a competitive market. The opening of borders in the former Soviet Bloc allowed Ruhrgas to further expand its pipeline networks, linking Germany to valuable natural gas reserves in the East. Even with the appearance of rival concerns like Wingas in the 1990s diminishing the company's market share, Ruhrgas remained the industry leader through its aggressive exploration of emerging energy sources in the North Sea, the Baltic region, and Eastern Europe.

[9] For more information on the history of E.On see: http://www.fundinguniverse.com/company-histories/EOn-AG-Company-History.html

Table 2. Overview of Merging Parties (E.On-Ruhrgas)

	E.On (2009)	E.On (pre-merger 2001)	Ruhrgas (pre-merger 2001)
Profit	EUR 5,328 million	EUR 2,048 million	EUR 491.4 million
Common Outstanding Shares	1,905,456,820	652,029,964	440,000,000
Employees	88,227	165,219	9,187
Market	Present in over 30 countries: Central European, Pan-European, UK, Nordic and the U.S. Midwest market units.	17 countries across Europe. Stakes in major energy companies in Scandinavia, Netherlands, Czech Republic, Hungary, Switzerland, Austria, Italy, Russia, the Baltic States and Poland.	Besides its majority presence on the German market, it is important on the markets from UK, Scandinavia, Belgium, Netherlands, etc and present in North and South American, Canadian and Asian energy companies.

Source:E.On Annual Report 2001 "Focus and Growth", E.On Annual Report 2009 "Thinking ahead. For the future of energy", both available at: www.eon.com ; Ruhrgas Annual Report 2001.[10]

5.1.3. European Commission Decision

The EU Commission decided it does not have jurisdiction in this case since two-thirds of the revenues of both firms were being realized in Germany. Therefore, EC has let the German Federal Cartel Office, Monopoly Commission and the German government to decide on the outcome of the merger between E.On and Ruhrgas.

5.1.4. Competitive Assessment

The German energy market is very complex and has started to be liberalized at the end of the 1990s. The gas network in Germany is complicated and the prices are among the highest in Europe when it comes to energy utilities (Eckert, 2003c). There are several competitors in the power market, but most of them are small companies, while about 80% of the market is concentrated and is covered by just a few big companies that have vertically integrated as a result of the liberalization process. While unbundling policies have been in process of development after the series of mergers in the energy sector, the major companies are vertically integrated and offer the end user all the necessary utilities, from goods to services.

[10] http://web.archive.org/web/20040611080705/www.ruhrgas.de/dateien/RuGa_GB_2001_en.pdf

5.1.4.1. Relevant Product Markets

The structure of the German market for both gas and electricity is very similar to a complex web made up of companies operating at several levels. This web is characterized by a high degree of vertical and horizontal contractual connections and economic interdependence between the companies involved (European Commission, 2007c).

The energy market in Germany can be separated into electricity and natural gas markets. It is worth mentioning that these markets have certain ramifications. For example, in the *electricity* markets there is generation and wholesale supply; transmission; distribution and retail supply. For the *natural gas* markets there can be distinguished: wholesale supply (market for the supply of gas to regional distribution companies and the supply to local distribution companies), storage; transmission, distribution and retail supply markets.

5.1.4.2. Relevant Geographic Markets

E.On and Ruhrgas are located on the German market, the largest European energy market. Its central location is a strategic geographical key factor for any company wishing to engage in European-wide trading. Though most of the activity of E.On and Ruhrgas are realized in Germany, they are active on several other energy markets worldwide.

In the case of E.On, the company's operations are organized into separate market units: the Central Europe market unit (focused on the company's electricity business and the downstream gas business in central Europe), Pan-European Gas market unit (operates its upstream and downstream gas business, and also holds interests principally in the energy business in Europe outside of Germany), the UK market unit (includes the energy business in the United Kingdom), the Nordic market unit (focused on the energy business in Northern Europe), the U.S Midwest market unit (involves the regulated energy market in the United States, Kentucky), the Company's Energy Trading market unit (combines its European trading activities for electricity, gas, oil and carbon dioxide allowances) (Factiva, 2010).

5.1.4.3. Market Assessment

Germany's electricity market is the biggest in continental Europe in terms of the number of players and generation of capacity. Germany also remains the most important transit country and the hub of the European electricity market (Smith, 2008). The great number of active players consists of three grid levels. First there are the four large-scale power generation companies (E.On, RWE, EnWB and Vattenfall) who own and operate the extra-high voltage and the high voltage transmission grids controlling together about 80% of the public generation capacity. Then there are the 30-40 regional distributors which are in charge of operating the medium voltage grid in their individual regions. Though they buy most of the required electricity from the four major generation companies, they also produce electricity to sell to local suppliers and large industrial customers. And third there is the level of supply of approximately 700 local utilities which own and operate the low voltage distribution grids. The regional and local distributors are mainly owned by Federal State governments and municipalities, or jointly owned by private and public sector companies. The four Transmission System Operators (TSOs) have been taking over regional and local distributors, thereby integrating downstream (Smith, 2008).

Ruhrgas on the other hand was Germany's biggest importer via its long-term contracts with the world's largest gas producer, Russia's RAO Gazprom, in which Ruhrgas owned a 4% stake (Richter and Sterns, 2002). Ruhrgas controlled almost all gas deliveries to regional and municipal companies in its control area, i.e. a national market share of about 58%. Ruhrgas controlled almost all of the gas imports to Germany, storage facilities and high-pressure transmission pipes inside Germany (Lieb-Dóczy, 2002a). The market share Ruhrgas had on the market showed a low wholesale market concentration. For comparison, in most countries the single gas supplier provided about 75% of total consumption (Jackson and Harris, 2003).

The main issue about the market created by the concentration of E.On and Ruhrgas would be its vertical integrated activity that would provide the end customer with all the necessary services and products in the power sector. The two German leaders in electricity (E.On) and gas (Ruhrgas) are due to create a giant in the energy sector. Its extended power on the German market, and not only, is to block other energy companies from entering the market. The fact that E.On-Ruhrgas would have a lot of benefits after the merger does not guarantee that it will pass the benefits to consumer welfare. On the contrary, they would have the power to decide on the prices and the liberalization process will be slowed even more.

5.1.5. Controversial Issues

There have been various transactions in the energy market in Germany as well as in the rest of Europe in the period of the proposed acquisition of Ruhrgas by E.On. Germany was the only member state not to have an independent energy market regulator (Knight, 2002). This left cases like this one to the discretion of the local authorities. The E.On-Ruhrgas merger was highly controversial and turned into a long and complex legal saga that lasted for about two years. There were a series of hearings on the merger, and it was cleared and blocked several times.

Initially E.ON did not want the merger to be of Community dimension, thus it chose to announce its intention to acquire majority stake of Ruhrgas before it has shown interest in acquiring UK Powergen that would have made the European Commission the decision maker of this operation. The European Commission has decided that the merger has to be regulated on national level because it was not of Community dimensions when it was proposed, therefore, with this well-planned move, E-ON merger with Ruhrgas fell under the jurisdiction of the German “watchdog”, the Federal Cartel Office (FCO) and the government’s right to veto came as a back-up plan in case the merger was blocked (Lockley, 2002). There was also the Monopolies Commission – an independent group of lawyers that had to advise on the antitrust implications of the concentration (Young and Konstantinoff, 2002).

FCO’s decision was to prohibit the merger on competition basis and the normal move to be made by E.On was to lobby the German government to overrule it (Eckert, 2002b). Yet another country that was trying to make a “national champion” in the energy industry was going against European regulation. The FCO was delegated by Brussels, and it was using EU rules as legal ground in its analysis, thus going against FCO decision was seen as defying the European Commission (Kavanagh, 2002).

One way or the other, the German government did use its rarely-used right to veto, and overruled the FCO decision. The government was put in an uncomfortable position because while it was mostly pro-merger in this case, the public pressure could force the government to act against E.On acquisition of Ruhrgas, should the issue become sensitive to the upcoming general election (Griffith-Jones, 2002).

After the public opinion turned against Economics Minister Werner Muller given his supposed interest in the energy market (Werner Muller was previously an executive at VEBA that merged with VIAG and created E.On in 2000), the Deputy Economics Minister Alfred

Tacke was the one to make the decision and he declared himself pro-merger and on July 5, 2002 and cleared the deal with few conditions. However, he made his decision without being in court for the first hearing on the merger on May 29, which he later on was accused for and gave course to another series of complaints. Ampere and Trianel, two energy trading firms, were the first plaintiffs in the Dusseldorf high court case. Municipal utility GGEW, near Bensheim, near Frankfurt, UK's Centrica, US energy trader TXU Europe, Stadtwerke Aachen, Stadtwerke Rosenheim and Concord Power GmbH were the others who soon also placed their official complaints in the case (EURGAS, 2002). The Dusseldorf high court has granted temporary injunction on the takeover due to "serious procedural errors" in the case (PLATT, 2002a). The energy giant RWE gas subsidiary Ingo Westen also went against the decision in court on competition basis, so the court scheduled a hearing with all the parts interested for July 24, 2002 (PLATT, 2002a).

There have been a lot of controversies regarding European Commission's lack of involvement in the case. On August 14, 2002, UK's power utility company Centrica filed a complaint regarding the concentration. The EC reiterated its position that the merger is not of Community dimension, but promised it would respond to the complaint (LBA, 2002c).

The government in the meantime planned a new hearing, on September 5, to respond to the court ruling blocking the takeover, however it did not bring an immediate decision, but on September 19, 3 days before the general elections, the German government approved the EUR 10.3 billion merger between E.On and Ruhrgas again adding conditions designed to overcome objections of the court that has blocked the deal (DJI, 2002). Two of the conditions were for Ruhrgas to sell its own stakes in Bayerngas and Stadtwerke Bremen and to decrease the dominant position of Ruhrgas on the German gas market by increasing the amount of gas available to the open market to 200 billion kilowatt hours (from 75 billion kilowatt hours as was stated in government's first conditions) over the next three years, to be sold at annual auctions (Richter, 2002a).

Ruhrgas chief executive Burckhard Bergmann made public his frustrations with the plaintiffs' real intentions regarding the lawsuit they have filed for against E.On-Ruhrgas merger, claiming that the complainants were only pursuing the goal of getting out-of-court settlements not of protecting consumer welfare. Some of the plaintiffs, according to him, had approached Ruhrgas with the intention to negotiate, which his company had declined (PLATT, 2002b).

Even with the new governmental clearing, the legal proceedings regarding the upheld injunctions were due to be prolonged until 2003. On October 14, 2002, the Dusseldorf high court set the final hearing for December 12, 2002, having 8 plaintiffs with a ninth one (Ares Energie AG) to be allowed (EUSPOT, 2002a). The decision was made only on December 17, when the court decided to uphold injunctions. E.On was determined to take the legal process further to the Federal Supreme Court (Bundesgerichtshof) in Karlsruhe if the main proceedings scheduled for February 2003 did not finalize positively for it (PLATT, 2002c).

A sign that E.On was taking all the possible legal actions in order for the merger to be cleared was when on December 23, 2002 it called for European Commission to investigate on the merger as it had little hopes that the court would clear the merger (PLATT, 2002d).

E.On was not expecting the court to rule in its favour, thus it was negotiating out-of-court deals to make the plaintiffs withdraw their complaints from the court (Richter, 2003b). E.On managed to make the nine plaintiffs withdraw their complaints one hour before the due decision. Without the settlements E.On would have faced months more of legal wrangling since the court was due to give a negative decision on the merger again (Richter, 2003c).

The various out-of-court settlements E.On has reached with the plaintiffs and the merger itself started a row of complaints after the merger was cleared again, this time by the court. One of the accusations came from Manfred Panitz, the head of the Consumer Association Body of VEA, who thought the merger was damaging the energy markets and Germany as a whole, and that the message was not related to what impact the merger will have in general, but to who has more cash. In his opinion the commitments E.On made to the nine plaintiffs opposing the takeover should have been to the benefit of the whole market and not individual companies (PLATT, 2003e). Also, UK has written the European Commission to take the matter in its hands due to competition hampering of the settlements made with the nine plaintiffs, as well as of the merger itself. UK’s largest domestic gas supplier Centrica expressed "disappointment that consolidation in the German market has been introduced, before effective competition" (WGI, 2003).

The FCO, soon after the court has lifted the injunction on the merger, has announced that the merger would stand, while they would inquire on the individual out-of-court settlements to find out whether they were against competition or not (EUSPOT, 2003b).

The biggest concern of the countries affected by the merger, besides the E.On-Ruhrgas merger, was the fact that the European law was not ready to deal with such cases. According to Richter (2003d), the UK gas and power regulator Ofgem had expressed itself "the E.On-Ruhrgas deal shows that inflexible legislative criteria may not capture deals affecting markets and consumers outside the domestic market". The EU Competition Commissioner Mario Monti said that the European and German regulators are jointly probing the agreements struck by E.On and these nine companies (Richter, 2003d).

5.1.6. Conclusion

In this first, out of four merger cases analysis, we have looked deeper into the political economy of merger control under autarky, i.e. insiders, and a great part of outsiders and market are located in the same country – Germany. Here insider 1 (E.On) tries to acquire majority stake in insider 2 (Ruhrgas). The competition authority in this case is the Federal Cartel Office (FCO, Bundeskartellamt) that has the authority, by applying European Commission Merger Regulation, to block the merger. Another local authority, this time with advising duties only, is the Monopolies Commission (Monopolkommision). The government or the Federal Economies Minister has the right to veto the decision of the FCO. An important detail to mention is that during this merger Germany was the only Member State in the EU that did not have an independent energy regulator that made lobbying by the interested firms even more influential in the matter.

The general relation showing this situation is: $e_{\pi_o} = e_{CS} < e_U^A = e_W \leq e_U^G \leq e_{\pi_I}$.

Motta-Ruta have shown in their theoretical model that there are two cases when it comes to mergers of two firms located in the same country. First is when both insiders and outsiders benefit from the merger $e \geq e_{\pi O}$ and so they lobby the authorities to endorse the merger. And the second case is the one $e < e_{\pi O}$ analyzed here, namely E.On-Ruhrgas, when the merger is detrimental to one side (outsiders and market) and is beneficial for the other (insiders), and vice versa, naturally forcing each interested part to lobby in different directions.

FCO analyzed the merger from the consumer welfare point of view and blocked the merger on anti-competitive basis. The Monopolies Commission also advised that the merger should be blocked. On the other hand, E.On is big enough to lobby the government and offer maximum contributions, so that the former uses its rarely used right to veto FCO's decision and endorse the merger. The government supported the merger in order to create a "national champion" that would be able to compete with international companies on the power market. Even though they have imposed certain conditions to the merger, these were not enough to offset the anti-competitive effects the merger would have on the German power market as well as on the European market where the concentration would be active.

EU's lack of involvement in the case along with the fact that Germany did not to have an energy competition regulator was due to create this irreversible and a big obstacle for the energy market liberalisation in Germany and the EU for years to come.

The merger itself was not oriented towards lowering the highest energy prices in Europe that the German population had, or towards improving the overly complex energy industry in Germany, but towards becoming a giant, whose status quo will be prevalent throughout the years, the prices will continue growing and the competitors will have a hard time accessing the very strategically located German market.

Without an improvement to the European Commission Merger Regulations, these types of situations are to continue, when the existing competitors try to get settlements out of big mergers, government follow their nationalistic interests and everyone ignores the actual impact of the merger on the consumer welfare, the future of the local and union energy market.

5.2. Case 2: Boeing/McDonnell Douglas (International Non-EU Merger)

5.2.1. Executive Summary

In the section below we will analyze the notorious acquisition of the American McDonnell Douglas Corporation by Boeing Company that made history as one of the biggest mergers ever. The aircraft and defence industries have always had a great deal of government involvement, and this case is no exception. In this merger the EC, on the behalf of Airbus consortium, tried to block it, going beyond its jurisdiction in the matter. The U.S. officials endorsed the merger first as part of the defence industry consolidation process, while the EC was looking for way to not clear it. We will explain why EC passes as a “politically motivated” authority and how the FTC and EC views on the merger could be so opposite. We will show how the issue was solved through negotiations and what compromises have been made by Boeing in order to convince EC.

5.2.2. Case Background

5.2.2.1.Operation

Boeing and MDC agreed to merge on December 14, 1996. If the merger is to take place MDC will become wholly-owned subsidiary of Boeing. Boeing offered initially 0.65 of its own common stock shares for one McDonnell Douglas common stock share making the deal worth USD 13.3 billion according to the closing price on the stock exchange market on December 13, 1996 (Zakaria, 1996).

The operation has an important economic impact on the large commercial jet aircraft market within the European Economic Area (EEA) and throughout the world. The relevant market for the purposes of assessing the operation is the world market for large commercial jet aircraft, while the EEA is an integral and important part of it and its competitive structure is very similar. The average market shares of Boeing and MDC in the EEA over the last ten years prior to the merger have been 54% and 12% respectively, in the world 61% and 12% respectively. It is therefore evident that the operation is of great significance in the EEA as it is for the world market of which the EEA is an important part.

Considering that both EEA and International markets, as well as the US defence interests would be affected by the concentration, in the decision process have participated both the European Commission and the Federal Trade Commission that have carried out all necessary notifications. The Commission took the concerns into consideration to the extent consistent with Community law. As far as US defence interests are concerned, the Commission has limited the scope of its action to the civil side of the operation since it has not established that a dominant position has been strengthened or created in the defence sector as a result of the proposed concentration.

The EC received a notification of the merger on February 18, 1997. The Commission decided on March 7, 1997, to continue the concentration suspension after examining the notification. According to the Commission, the concentration falls within the scope of the Merger Regulation and raises serious doubts to its compatibility with the common market, and by the decision from March 19, 1997; it initiated proceedings to further investigate the merger.

The idea to unite the two companies has been discussed on and off for about 3 years, but it was decided in the last week before the announcement of the merger on December 15, 1996.

Table 3. Timeline of Boeing-McDonnell Douglas Merger

Date	Event
December 15, 1996	Boeing announces its intention to merge with McDonnell Douglas
February 18, 1997	EC is notified of Boeing and MDC decision to merge
March 7, 1997	EC decides to continue the suspension of the concentration
March 19, 1997	EC decides to get an in-depth probe on the merger
May 13, 1997	Karel van Miert – the EC Competition Minister – pronounces himself against the merger as it is
May 21, 1997	"Statement of Objections" sent to Boeing and McDonnell Douglas
June 12/13, 1997	Hearing with the parties and EC
July 1, 1997	FTC announces decision – merger endorsed, no conditions
July 23, 1997	EC is due to announces positive decision on the merger
July 31, 1997	EC decision finalization
July 25, 1997	Shareholders meeting to vote on the merger of Boeing and MDC
August 1, 1997	Merger completed
August 4, 1997	Start of activity as Boeing that integrates MDC.

Source:Author based on articles from www.factiva.com

The activities of Boeing and MDC are mostly complementary, though they overlap slightly in the commercial activity. This however was not supposed to be a huge matter since the undertakings have considered all their programs and got to the conclusions that the overlaps are minor and that there is competition in that particular area, and in the military and space programs they are completely complementary. With this conclusion, the merger should have not been blocked due to antitrust issues (Mohammed, 1996).

In order to minimize layoffs the plan was to reassign employees to other positions. The activities of the operating locations were going to be left the same.

While the completion of the merger was planned for the mid-1997, but this took place only on August 1, 1997, due to the EC scrutinizing (Mohammed, 1996).

The merger of MDC and Boeing would create the world's largest aerospace company in the world, combining the first largest company Boeing with a far third company McDonnell Douglas.

5.2.2.2.Parties

Both parties are US corporations whose shares are publicly traded.

The Boeing Company (Boeing) is involved in the design, development, manufacture, sale and support of commercial jetliners, military aircraft, satellites, missile defence, human space flight and launch systems and services. The Company operates in five business segments: Commercial Airplanes, Boeing Military Aircraft, Network & Space Systems, Global Services & Support, and Boeing Capital Corporation.[11]

Boeing operates in two principal areas: commercial aircraft that involves operations like developments, production and marketing of commercial jet aircraft and providing related support services to the commercial airline industry world-wide; and defence and space with operations involving research, development, production, modification and support of military aircraft and helicopters and related systems, space systems and missile systems, rocket engines, and information services.

MDC operates in four principal areas: military aircraft and missiles, space and electronic systems the operations of which involve the design, development, production and support of the major products like military transport aircraft, combat aircraft and training systems, commercial and military helicopters and ordnance, missiles, satellites, launching vehicles and space station components and systems, lasers, sensors, and command, control, communications, and intelligence systems. In commercial aircraft area the company designs, develops, produces, modifies and sells commercial jet aircraft and related spare parts. MDC

[11] For more information on McDonnell Douglas Corporation history see: http://www.centennialofflight.gov/essay/Aerospace/McDac/Aero32.htm

also provides financial services like commercial equipment leasing and in the commercial real estate market, for itself and for commercial customers.

Table 4. Overview of Merging Parties (Boeing-McDonnell Douglas)

	Boeing 2009	**Boeing (pre-merger 1996)**	**McDonnell Douglas (pre-merger 1996)**
Profit	USD 1,312 million	USD 1,818 million	USD 788 million
Common Outstanding Shares	758.5 million	967.2 million	209.6 million
Employees	157,100	211,000	63,873
Market	The biggest aircraft producing company worldwide.	World market.	US, worldwide.

Source: Boeing most recent data by Reuters, Factiva available at: www.factiva.com; "People Working Together as One Global Company for Aerospace Leadership" The Boeing Company 1997 Annual Report.[12]*MDC Financial Data for the year 1996.*[13]

In order to have a better idea about what the two undertakings history is, we will refer to their origins and their activity prior to the proposed concentration.

In 1916 Bill Boeing built his first plane with Navy officer Conrad Westervelt. The factory in Seattle was called Boeing Airplane Company. It became the world's leading commercial aircraft company and has dominated the market with a share of over 60 percent prior to the proposed merger with MDC. Boeing built training planes for the US navy during the First World War, but when the military sales dropped it began the first international airmail service between Seattle and Victoria, British Columbia using its newly designed flying boat. Along with a series of innovative planes was the 307 Stratoliner, Boeing manufactured the first aircraft with a pressurized cabin. In 1960s Boeing built the first stage of rockets that were used in the Apollo space programme. After that Boeing started the production of the best-known jet – the 747 (Usborne, 1996).

The McDonnel Douglas company had a rather different start. When Donald Douglas started the Davis-Douglas company in the back of a Los Angeles barber's shop in 1920, the idea was

[12] http://www.boeing.com/companyoffices/financial/finreports/annual/97annualreport/fiveyear.htm
[13] http://web.archive.org/web/19970605081239/www.mdc.com/version2/96annual/page54.htm

to build a bi-plane for David Davis. The latter planned to fly it in the first non-stop transcontinental flight the following year. With the failed attempt, David Davis left and the firm was re-named the Douglas Company.

Before the announcement of the merger between Boeing and MDC, McDonnell Douglas' commercial division has struggled against competition and recorded a loss caused by the costs of developing the MD-11, three-engine medium to long-range wide-body airliner (Usborne, 1996).

In the 1990s MDC had a cut in its development projects making it unable to sustain its previous activity and forcing it to layoff a big part of its staff, downsizing in its commercial division from 50,000 employees to 14,000. Also, its reduced commercial activity was not enough to save the company (Bochove, 1996). Therefore the acquisition by Boeing came as a surprise, but as a logical step to take as well.

5.2.3. EU Commission Decision

The EC has spent a good deal of time trying to make Boeing compromise as much as possible and to offer remedies in order for EC to clear the merger. Therefore, the merger was cleared on July 31, 1997 with remedies. In order for Boeing to complete the merger, it had to renounce at the exclusive long-term contracts with the American carriers, to operate the McDonnell Douglas unit as a separate legal entity for ten years, and to not use the customer support services for existing McDonnell Douglas commercial aircraft as leverage to close new Boeing deals (AIFN, 1997).

5.2.4. Competitive Assessment

The concentration created by Boeing and MDC affects the market for large commercial jet aircraft that consists of new large commercial aircraft and second-hand aircraft.

5.2.4.1.Relevant Product Markets

The new large commercial aircraft cannot have a definite segmentation as due to the Commission's investigation it has become clear that there exist varying opinions on the part of manufacturers and customers as to the appropriate segmentation of the overall market. However, the narrow-body (or single-aisle, seating capacity for about 100-200 passengers) and wide-body (or twin-aisle with 200-400 and more passengers capacity) difference proposed by the notifying party seems to be generally accepted as a valid segmentation.

Though the two markets (for narrow-body and wide-body aircrafts) have been considered distinct within the overall market, the similarities of the structure of these two markets make the competition problems of the merger the same for both markets. Due to this problem, the Commission has to assess the merger effects on both markets at the same time.

Besides the two sub segments of the new aircrafts market, there is another market for commercial jet aircraft sold on second-hand basis. About 30% of passenger aircraft change airlines while remaining in passenger use. The rest two-thirds of freighters demanded are covered by the converted used passenger aircraft. The significant sales in this type of market, as well as taking into consideration the decision on a previous market related case (merger case Aerospatiale-Alenia/de Havilland) the Commission finds appropriate to consider the second-hand aircraft market as separate from the new aircraft market.

5.2.4.2.Relevant Geographic Market

Large commercial jet aircraft are sold and operated throughout the world under similar conditions of competition. Relative transportation costs of delivery are negligible. Therefore, the Commission considers that the geographic market for large commercial jet aircraft to be taken into account in a world market.

5.2.4.3.Market Assessment

There are three competitors on the market of commercial jet aircraft, namely Boeing, Airbus and MDC (respectively the first, second and third leading company on the global market). Boeing over the years before the proposed merger had an average market share of 54%, Airbus about 34%, and MDC 12%.

The main customers of large commercial jet aircrafts are the airlines and leasing companies. Even though MDC would not bring a big market share after the merger, it would increase Boeing's production capacity, so after the merger it would be able to produce twice as much as Airbus. It will also increase the customer base (from approximately 64% to 84%), its labour force and production level, making Boeing the exclusive leader on the market (Commission Decision).[14]

5.2.5. *Controversial Issues*

This huge merger between Boeing and McDonnell Douglas was due to great controversies because such giant concentrations do not pass unnoticed by anti-trust regulators, or governments. The aerospace and defence industry has always had a great deal of government involvement and support. Therefore it was expected that in addition to the anti-trust authorities, the governments of certain countries would also try to take part in the decision-making process regarding this merger that would reduce the number of commercial aircraft producing companies to only two.

After the cold war ended, in the beginning of the 1990s the American government has halved its budget for defence, leading to major downsizings and forcing companies to find M&A solutions for their survivals. In this way most of the defence industry companies have found their "match" and merged in order to stay afloat given the low budget allocated by the government for defence products.

In this state of affairs, McDonnell Douglas, having an activity of 70% in defence aircraft manufacturing was on the edge of losing most of its defence business, and having lost a major governmental defence project Joint Strike Fighter (JSF) that would have helped it stay afloat, was on the brink of going down sooner or later. Boeing, even though a leader on the commercial aircraft market worldwide, after the three-years long negotiation with McDonnell Douglas, finally made the public announcement of the Boeing-MDC merger on the 15th of December 1996. The American Federal Trade Commission (FTC) had to pronounce itself on the merger by mid-1997 as well as the companies' shareholders.

However, other implications were to also arise on the EC side. Though most of the Boeing and MDC assets are located in the United States, a good part of its business was in Europe, where Airbus Industrie – government-owned aircraft manufacturer – was located. This has

[14] Commission Decision, 30 July 1997, Case No IV/M.877 - Boeing/McDonnell Douglas, Council Regulation (EEC) No 4064/89.

drawn the EC attention towards competition issues, since, in their view, the acquisition of MDC by Boeing was leaving not too much business for Airbus.
The official announcement Boeing officially made to the EC about its decision to merge with MDC itself signified that Boeing would take into consideration the decision of the EC. The Commission had to provide an answer within one month after the announcement.

On the one hand, it was unclear how Washington regulators would react to such a huge merger, even if in the mid-1990s the US government has encouraged consolidation in the aerospace industry allowing the mergers between Lockheed and Martin Marietta (Lockheed Martin) and Northrop and Grumman (Northrop Grumman), The Pentagon had also actively encouraged consolidation in the belief that the mergers would lead to savings, though its procurement department would like to have some diversity in the field.

On the other hand, Airbus consortium has been suggested by the EC that in order to keep up with the future competition of the “new” Boeing it will have to create a limited company, and it would have to be fast, not by 1999 as initially planned. The Airbus Industrie was split between Aerospatiale and DASA with 38 percent each; British Aerospace had 20 percent and CASA of Spain – four percent. The partners had divided views over how to structure a new company (Noble, 1997). It is a fact that the announcement of the Boeing-MDC merger came as a wake-up call for the European regulators that it was time to consolidate the EU aircraft and defence industry. Instead of doing so, the Europeans tried to hinder Airbus’ future only competition by blocking the merger.

The line of controversies started when a month after the announcement EC requested more information on the merger in order to decide. The fact that Boeing had 60% of the world market of commercial airplanes was due to bring some anti-competitive claims by the EC. However, the EU and the US had an antitrust pact according to which the mergers of the US companies will have the American FTC as main authority to decide, and the EU companies will have the EC to decide, and co-operation would be open on such cases. The EC’s main concern was that the merger would harm competition in the aerospace industry. The EU Competition Minister in Brussels Karel Van Miert, however, publicly pronounced himself against the merger from the beginning. Having done that during the ongoing investigation, he was criticized by the US officials, since the investigation before making the decision should be impartial and confidential.

One thing that provoked the EC against the Boeing-MDC merger was the long-term high-quantity exclusive contracts Boeing has closed, a few months after merger announcement, with two major American carriers (Delta Air Lines, American Airlines) and a third to follow soon after (Continental Airlines). In these exclusive deals, Boeing engaged to supply the carriers with all the equipment and maintenance service they needed over the next 20 years (contracted at an undisclosed discount). This deal would immediately take about 30% of the market for the future two decades. Airbus had hoped for a share of these orders, but has been excluded from the deal. This major issue has been intensively used against the merger by the EC regulators.

Karel Van Miert initiated an in-depth inquiry on the Boeing-MDC merger, because according to him "this merger case is not in line with the European Merger Regulation". Brussels have included in a letter ('Statement of Objections') to both companies, Boeing and McDonnell Douglas, all the worries the Commission had to the merger and they expected formal remedies to these worries (LBA, 1997a). EC had three main concerns on the merger: it was against Boeing's exclusive 20-years contracts with the US carriers, it feared of the effect of the deal on the defence industry – McDonnell Douglas's main activity being defence, and the general big size of the deal as a whole. The estimate of the EC was that the "new" Boeing would have about 70% market share worldwide (Chalmers, 1997). The EC also worried about the possibility of spillover of public money for research and development in defence, into Boeing's civil aviation business.

Seeing itself facing the fact of the matter, the EC was trying to make all that was in its power to block or at least put certain restrictions on the merger. EC instead of trying to consolidate its own industries is trying to intervene to lower the effectiveness of other countries' industries (FLGI, 1997). Of course, if the EC had certain doubts about competition it should inquire and discuss them with the American authorities, and not take direct actions to interfere with the outcome of the actual merger. The EC has the right to directly get involved in the matter when there is proof that the activity of the merged company constitutes a threat for the European competition in the industry. This gives ideas about the EC “political motivation” when it is trying to interfere with a merger in order to protect the European aircraft manufacturing consortium-Airbus.

The Commission's stance has been criticised by US senators as being based on political issues such as protecting the Airbus consortium and European defence jobs (ELTIM, 1997), to which Van Miert publicly replied "our analysis of the Boeing-McDonnell Douglas file is conducted strictly on the basis of the European Merger Regulation, and nothing else"(LBA, 1997a).

The EC Competition Minister had taken up the right to threaten Boeing that if the long-term contract arrangements with the US carriers were not cancelled, Brussels could veto the merger or impose fines. In this way, EC had extended its anti-trust jurisdiction over the US companies, a move that was highly condemned when similar attempt was made by the US with regards to EU-based companies’ mergers. Boeing threatened to contest the EU's jurisdiction if the latter blocked the deal. The US vice-president Al Gore warned the EU against intervening. Such a tensioned situation was not doing any good any of the parts involved, and Boeing-MDC have tried to calm down the authorities and call for an impartial decision on the merger. The high political involvement in this matter required double attention on the moves made by everyone involved.

In the mid-June, 1997, during the air show in Paris, the ministers of the four countries that own Airbus, have made public their disagreement regarding the merger that will have the know-how and governmental support to create a strong position on the market that will jeopardize worldwide competition in the aerospace industry (Tran, 1997).

On the same day another attack came to the MDC address. Mr. Jean Pierson, the managing director the Airbus Industrie, made public his opinion regarding the implied intentional loss of the JSF contract in order to make the FTC allow the upcoming merger with Boeing. These two activities would have given motives to the FTC to suspend the merger on competition reasons (Skapin, 1997).

According to the EU Law, the EC must probe all mergers involving companies with a Community dimension worldwide irrespective of their nationality. The 1990 merger law allows the Commission to block a merger completely if the concessions it requires to ensure fair competition are not met.

According to aviation sources, Van Miert has been so avert to the merger from the beginning just to act as a lever to force the US to renegotiate the rules governing support for civil aircraft programmes (Harrison, 1997). Airbus was hoping to reopen the 1992 General Agreement on Tariffs and Trade (GATT) because it finds its terms too restrictive. Under GATT, governments are restricted in the amount they can give companies for development of new aircraft (Egan, 1997).

So, while still in process of in-depth analysis of the merger, EU officials managed to reopen the negotiations with the U.S. officials, but EC was assuring everyone that it has no relation with making the decision on Boeing-MDC merger (LBA, 1997b).

With this in mind it would not be hard to believe that the EC, at the request of the four Airbus partners, was trying to raise the ceiling on repayable launch aid for new commercial aircraft programmes from 33% to about 50%. This change would give Europeans the opportunity to provide Airbus with enough financial aid for it to launch its 600-seater super-jumbo, the A3XX (Harrison, 1997). However the US would never agree to this as it would give Airbus an advantage in the civil market (Harrison, 1997).

On July 1, 1997, FTC announced its decision not to block the merger and to impose no conditions to the Boeing-MDC merger. According to the FTC McDonnell Douglas was no longer a competitive force on the commercial aircraft market. However, FTC did mention that Boeing's exclusive contracts were "potentially troubling" (Chalmers, 1997).

Europe's position was completely opposite to that of U.S. anti-trust authorities. On July 4, the EC that backed the opinion of Karel van Miert, announced that it was not satisfied with the merger and that Boeing and McDonnell will have to make serious changes in their structures in order to make the merger get through. The necessary changes also had to be made before July 23, 1997 when the EC had to finally pronounce itself on the merger (IRTI, 1997).

Although it is understandable why the EC would try to get as many concessions from the Boeing-MDC merger, it should still be an impartial anti-trust regulator. Siding with Airbus and with European military aircraft producers would be a setback not only for trans-Atlantic trade relations, but for Europe's aerospace industry as well (JLCOMM, 1997).

"The Boeing-McDonnell Douglas proposed merger must be evaluated solely on the basis of competition policy considerations by Europe, not on the basis of political considerations in Europe or on the basis of trade policy or other extraneous considerations," U.S. Trade Representative Charlene Barshefsky said (Scott, 1997). In order to make sure that EC regulators took only competition issues into consideration while evaluating the effects of the Boeing-MDC merger, Charlene Barshefsky also mentioned that U.S. officials "will take a careful look at the merger review" (Scott, 1997).

According to Torres (1997) the American president Bill Clinton said that the European Union and the United States would "probably" avoid a trade war over the issue and that "here's an orderly process for our handling of this and I think we'd better let the orderly process play itself out before we talk ourselves into a trade war".According to the same source, the French President Jacques Chirac said he fully backed the European Commission's plan to block the merger as an increasingly tense confrontation developed between the two sides. The U.S. officials reacted to the initial decision to block the merger on anti-competitive basis. "The sole true reason for the European Commission's criticism and imminent disapproval of the merger is to gain an unfair competitive advantage for Airbus, a government-owned aircraft manufacturer," said the U.S. Republican Senator Slade Gorton (Torres, 1997).

These constant conflicting views of EC and FTC on the merger, FTC already endorsed it, while EC does not plan on doing it without some concessions leads us to the thought that each of the authorities tries to defend their own “flagship industry” – U.S. protects its “champion” and Europe-its (Dahl, 1997). It was a rather more politically motivated issue. Boeing, in its attempt to finalize the merger and without a wish to back out, has given in to the restrictions and succeeded.

Even though Boeing was reluctant to give up the exclusive contracts signed with the three US Airlines, according to AIFN (1997) under the threat of a USD 4.8 billion fine that could be imposed by the EC Boeing agreed to EC conditions in order for the latter to endorse the merger. The concessions helped convince the EC to approve the USD 14 billion merger (AIFN, 1997). According to the same source, Boeing agreed to concessions that include:

-Providing customer support for existing McDonnell Douglas commercial aircraft, without using it as leverage to obtain any advantage in the sale of new Boeing aircraft;

-Refraining from signing any exclusive contracts with Boeing suppliers;

-Operating McDonnell Douglas' civil aircraft unit as a separate legal entity for ten years.

The EC approved the Boeing-McDonnell Douglas merger July 23, 1997, finalized its decision by July 30, once legal procedures have been completed. On August 1, 1997, Boeing finalized the merger and on August 5, 1997 it began its activity as the "new" Boeing.

5.2.6. Conclusion

This merger case is an international non-EU merger. The insiders – Boeing and McDonnell Douglas – are both located in the US (country A). The outsiders are located in the European Union (country B). There are two anti-trust regulators, the Federal Trade Office in the insiders' country the European Commission in the outsider's country – the European Union.

The general relation for this particular situation is: $e_B^A = e_B^G = e_{\pi_o} = e_{CS} < e_W < e_{\pi_I}$.

Motta-Ruta have shown with their model on this type of mergers that while the merger benefits the insiders' country national welfare, it hurts the outsider's welfare, and vice-versa. In this particular case, the politically motivated governments represented by the EC have tried to block the merger on the behalf of the government-owned Airbus consortium which would face a harsher competition after the merger. On the other side of the deal, the American FTC had a behaviour based on the merger's efficiency. It endorsed the merger without imposing conditions based on the fact that McDonnell Douglas was not a powerful competitor on the market prior to the merger. The FTC was in favour of the merger because it was pro-competitive, in their view, it was part of the American aerospace and defence industry consolidation, and it would be for the country's consumer welfare.

For values of the efficiency gains e such that $e \leq e_B^A = e_B^G = e_{\pi_o}$ the insiders' anti-trust authority endorses the merger. The government in country B opposes the merger and the competition authority eventually endorses the merger though under lobbying pressure of the outsider. The merger in our case is cleared by the EU competition authority only with certain concessions to be made by the insiders. In this case of 'politically motivated' governments, the merger is approved with probability 1-ε_B. The merger has inverse effects on consumer surplus and the profits in the EU.

The authority in the EU will oppose some efficient mergers from the point of view of aggregate welfare as it disregards the profits of the insiders in country A. It is important to mention for this case that only domestic firms can lobby the government one of the reasons being that it is much easier for them to do so than for foreign companies.

We can conclude from this that Boeing's competitors in the EU can lobby the anti-trust authority in their favour, when their government is politically motivated. The EU government politically motivated because it imposed certain restrictions that favour the outsider. Also, it is obvious from the scrutinizing of the case, even though the insiders where outside of the EU. Competition in-depth analysis aside, this case seemed like each part involved is trying to protect their own "champion" trying not to lose the power in the aerospace and defence industry of their countries. If the US authority had full jurisdiction on the merger, it would approve it whenever proposed given that insiders' profits increase and so the US welfare would also increase, thus there would be no need for insiders to lobby the US government. However in this case there are two authorities so the merger is approved or rejected according to the decision of the EU since the market is located there as well.

This case is very interesting because even though there are two authorities with two opposing opinions on the merger, there are concessions made by the insider in order to not start a political war out of the situation, and to be able to continue its activity with a new company on board, having all the markets open. The whole political involvement of the governments of the interested parties made this case a controversial one, besides the fact that Boeing was a big company anyway, and it was the competitor for Airbus consortium to begin with. While the USA has cleared the merger from efficiency point of view, Europe realized that it was falling even more behind because Airbus did not have a full range of airplanes to offer its carriers, as well as technology or innovations. Airbus required restructuring to a limited company that would allow it to work more by the market forces than government regulation.

5.3. Case 3: Hypoverein/Unicredit (International EU Merger)

5.3.1. Executive Summary

In the section below we will analyze the controversies in Poland around the EU merger through which UniCredit bank from Italy acquired the German Bayerische Hypo-und Vereinsbank AG. The Polish government went very far with its attempts to block the merger and this led the Polish government on the brink of a law suit with the EC for taking authority that did not belong to it. Even without having the authority, the Polish government has achieved to reach a compromise with the concentration in exchange for its approval of the merger. We will discuss by what means the Polish government intervened in the merger process, what it was hoping to achieve, and what the compromises they have reached were.

5.3.2. Case Background

5.3.2.1.Operation

In June 2005, Unicredito Italiano S.p.A. (UCI) and Bayerische Hypo-und Vereinsbank AG (HVB) have reached an agreement to integrate their respective banking businesses. The concentration would allow UCI to acquire sole control of HVB.

In some European countries the concentration means merging domestic banks. The merger of UCI and HVB will bring cost synergies of EUR 165 million to 2008 (PAPMKI, 2005).

On 26th of August 2005, UCI launched a public exchange share-for-share offer for the whole share capital of HVB. UCI's offer was 5 of its shares for 1 of HVB's and got an acceptance of 93.93% of HVB shareholders before November 11, 2005. The merger has been completed on November 24, 2005.

The concentration of these two companies has been proposed to the Commission on September 13, 2005. The Commission decision has been not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement.

Table 5. Timeline of Unicredit-Hypoverein Merger

Date	Event
1999	UCI buys Pekao
2005	UCI becomes owner of BPH through HVB
June 12, 2005	UCI-HVB Merger Proposed Announced
August 26, 2005	UCI announces share-for-share offer to HVB
September 13, 2005	UCI notifies the EC of intention to merge
September 25, 2005	Polish Parliamentary Election
October 18, 2005	EC clears the merger
November 11, 2005	HVB Shareholders' Acceptance of 93.93%
November 24, 2005	Merger Completed
December 17, 2005	New board appointed at UniCredit-HVB
January 13, 2006	EC requests Polish authorities explanations for blocking merger
April 2006	UCI reaches compromise with Polish government

Source: Author based on articles from www.factiva.com

5.3.2.2.Parties

UCI is an international Italy-based bank listed on the Milan stock exchange. It is one of the world's top ten banking groups and its core markets are Austria, Germany, Italy and Central and Eastern Europe (CEE). It is also the number one bank in Bosnia-Herzegovina, Bulgaria, Croatia and Poland and has a top position in another 16 CEE countries.[15] UCI has a network of about 10,000 branches, 165,062 employees servicing 40 million clients in 22 European countries. The Company's division model is based on four pillars: Customer Centricity (focuses on the retail, corporate & investment banking and private banking areas), A Multi-Local Approach (empowers the Group's local banks to oversee the distribution networks and customer relationships), Global Product Lines (are the value-added centers for all regions that leverage the Group's significant in-house expertise, such as asset management), and Global Service Lines (which supply the network coverage functions and product factories with specialized services, including banking back office, information and communication technology, credit collection, procurement services, real estate and shared service centers) (Factiva, 2010).

[15] For more information, see: http://www.unicredit.eu/en/home/unicredit-cee.html

HVB is an international Germany-based bank listed on several stock exchanges in Germany and in other European countries.

Both banks offer a wide range of banking and financial services in several European countries, including retail and corporate banking services as well as investment banking and asset management services.

Before the proposed merger with HVB in June 2005, UCI had a network of 4,455 bank branches with 69,000 employees at the end of March 2005 (MIRAUS, 2005). UCI was a key player in the Italian banking industry, specializing in three market segments – retail, private banking and corporate banking. On the Italian market it was only preceded by Banca Intesa, and was followed by Sanpaolo IMI, Capitalia, Banca Monte dei Paschi and Banca Nazionale del Lavoro.

Table 6. Overview of Merging Parties (Unicredit-Hypoverein)

	UCI (pre-merger 2004)[16]	**UCI (2009)**	**HVB (pre-merger 2004)**
Profit	EUR 2,131 million	EUR 1,702.33 million	EUR 2,137 million (loss)
Common Outstanding Shares	6,249.7 million	17,573,116,070	N/A[17]
Employees	68, 571	165,062	57,806
Market	Austria, Germany, Italy and Central and Eastern Europe (CEE). Number one bank in Bosnia-Herzegovina, Bulgaria, Croatia and Poland.	As pre-merger, consolidated position in the CEE.	Leader in Austria. CEE

Source: UCI data for 2009 extracted from www.factiva.com; HVB data for 2005 – MIRAUS,(2005) and Summary of Annual Financial Data for 2004[18]

On the other hand, HVB was serving more than 9.8 million customers and had a vast network of 2,085 branch offices and over 57,347 employees. HVB Group was the second largest bank in Germany and the undisputed market leader in Austria, with the largest financial services network in Central and Eastern Europe (CEE). Its subsidiary, Bank Austria Creditanstalt's (BA-CA) retail and corporate customer activities accounted for a good share (about a

[16] http://www.unicreditgroup.eu/ucg-static/downloads/financial_summary_2004.pdf
[17] Not Available
[18] http://ar06.hvb.de/hvb/en/corpgov/summaryannualfindata/?freesearch=Net+Income+2005&x=0&y=0#

quarter) of HVB's positioning on the market (MIRAUS, 2005). HVB was the second on the German market following Deutsche Bank and preceding Dresdner Bank and Commerzbank.

5.3.3. EU Commission Decision

On October 18, 2005 Unicredito Italiano S.p.A. receives EC permission to acquire by means of public bid Bayerische Hypo-und Vereinsbank AG. The EC found the operation compatible with the EC anti-trust rules and regulations, and had no proof that there could be serious threats on neither domestic nor European competition in the banking industry.

5.3.4. Competitive Assessment

5.3.4.1.Relevant Product Markets

There are several relevant product markets for this transaction, namely retail banking (deposits and account services, payment services, lending, products), corporate banking, factoring, financial market services, investment banking and asset management.

Some financial services such as deposits, lending, mortgage loans, payment transactions, credit card issuing, custody accounts and distribution of mutual funds could be considered separate product markets. Also it might be appropriate to distinguish between services offered to small and medium-sized enterprises (SME) and large corporate customers. However, the EC decided that no meaningful distinction can be made between the supply of corporate banking services to SME and large corporate customers since products to both categories of customers follow the same fundamental principles.

Banks offer a package of services to their corporate clients, and large corporate customers tend to use different banks for different products to ensure a competitive offer, avoid supplier lock-in and satisfy specific needs. In the case of SME, they prefer to use the services package only from one bank and stay with the bank, since switching to a different bank would imply substantial indirect costs.

In the case of UCI and HVB merger, respective to the type of products factoring, financial market services, investment banking and asset management, it is not necessary to conclude on the market definition because the proposed concentration does not raise serious doubts irrespective of how the market is defined.

5.3.4.2.Relevant Geographic Market

Dependent on the type of products, the parties suggest that the geographic market of their merger is national or international in scope. They consider corporate banking markets at least national in scope, though some sectors have already developed a more international dimension. Regarding financial market services, investment banking and asset management, in the parties' view the markets are wider than national, possibly EU-wide or worldwide.

5.3.4.3.Market Assessment

The activities of the parties mainly overlap in the Czech Republic, the Slovak Republic and Poland. They do not give rise to any affected markets in other EU member states.

In *Czech Republic*, the merger (of HVB Bank Czech Republic, owned by HVB, and Živnostenská banka, owned by UCI) would create a second-tier bank with a big gap to the three first-tier banks: ČSOB, Česká spořitelna and Komerční banka, and would be only the fourth on the market. However, due to many other considerations specific to this market, the high market share is not a reason for competition concerns.

In *Slovak Republic*, the merger will concentrate the fifth and sixth largest banks into one (HVB Bank Slovakia, owned by HVB, and Unibanka, owned by UCI) making the new entity the fourth largest bank in the country. It will still remain behind the three largest banks, and many of the smaller banks present are also owned by big international banks with lots of expertise, making good competitors for the new entity on the market in all segments of commercial banking. The merged bank's market share would constitute around 15 percent, so it would fall behind the two biggest banks ČSOB and Istrobanka with estimated market share of 25-35% each. Here again, with all the above considerations, it does not lead to competition concerns on any of the relevant markets.

In *Poland* the merger will combine the second largest bank (Pekao, owned by UCI) and the third (BPH, owned by HVB) creating the leader in terms of assets with about 21% of all banking assets, and probably tied leader with the currently leading majority state-owned bank PKO BP (PKO) in terms of bank network. PKO will remain the leader regardless of the effect the merger has on other measures. The merged firm will have 20% of the market overall. The Polish bank market is not very concentrated, five leading banks holding 50% of the market share. Having a closer look into all the specifics and distribution issues of this merger case, the Commission determined that the combination of the branch networks of the parties will not lead to a significant reduction of choice in individual regions of the country, especially since there are more than 600 cooperative banks serving local areas throughout the country. The market investigation has confirmed that competition from branches of all the main rival banks would remain strong (include Commission decision number). [19]

5.3.5. Controversial Issues

The acquisition of the second German bank HVB by the ninth-largest bank in Europe, and one of the biggest banks in Italy, UCI, would have a great impact on the whole European banking sector, affecting the markets of various European countries on multiple levels. The concentration would create the continental Europe's fourth-biggest bank (ECN, 2005).

The acquisition of HVB Germany by UCI Italy was an enormous merger with several effects on the CEE (Central and Eastern European) market. Though the merger would also affect the Czech and Slovak markets, it would not reach one of the top three dominant positions on these two markets. On the Polish market, however, it would become a strong second position. That is why after the merger announcement from June 2005 UCI has had a strong opposition in Poland.

The Polish new conservative minority government was strongly opposing the concentration (AFPR, 2005). Its main concern was that the state-owned PKO could fall from its traditional clearly leading position, since the merger would create a strong position on the market for UCI. The UCI takeover of HVB would give UCI a leading position on the market, and PKO would stop being the biggest market share holder (Buck, 2006). The core of this issue is the fact that both UCI and HVB have acquired, prior to the proposed merger, other two big banks on the Polish market. Before the initiation of UCI's acquisition of HVB, it has bought Pekao from the Polish State Treasury in 1999 and in 2005 UCI indirectly became the owner of BPH Poland through HVB.

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[19] Commission Decision, 18 October 2005, Case No COMP/M.3894 - Unicredito / HVB, Regulation (EC) No 139/2004.

In its attempt to block the merger, the Polish government came up with its main argument – the downsizing that is imminent after the merger due to overlapping activities of the banks. It also claimed that the huge acquisition will threaten and harm competition on the Polish market. Though the analysts did admit imminent layoffs of 9% in Central Europe due to the merger (PAPMKI, 2005), the government also had its own interests for this merger not to take place. It was not the lack of consumers' welfare from the merger, but the government's wish for the PKO to remain the indisputable leader on the market.

According to the European Union law, the Polish government had no authority to take any kind of actions to block a merger. They had to inform the European Commission Merger Control authorities of certain issues that in their opinion the proposed merger might create, and let the EC authorities handle the matter. The Polish government had not done this and instead it took a rather nationalistic stand in the matter using all the possible excuses to block the merger.

The EU Commission however cleared the merger on October 18, 2005 after which the Polish government took another turn in their obstruction of the already-cleared merger. According to Cohen (2006) it was claiming that UCI has violated the privatization agreement it signed when it bought Pekao by trying to acquire HVB (the owner of BPH). Supposedly it had been stipulated in the so-called "non-competition clause" when UCI acquired Pekao in 1999 that throughout a period of 10 years after the Pekao privatisation, UCI was prevented from "opening subsidiaries and/or branches in Poland, acquiring control of banks active in this country and making any capital investment in any company active in the Polish banking sector" (European Commission, 2006a). When the EU Commission warned the Polish government that they have no legal grounds on blocking the merger, they knew they have to change the aggressive strategy and look for compromises with UCI, otherwise a lawsuit was imminent. EU gave the Polish authorities until January 23, 2006 to explain their position, or legal action would be taken (Cohen, 2006). The trend of nationalistic-oriented lawsuits was present in Europe (with France and Spain) at the time, and Poland was close to being involved in one anytime soon if compromises were not found (Landler, 2006).

After a few months since EU Commission cleared the merger, in April 2006, UCI reached a compromise with the Polish government. It consisted of the Polish government allowing UCI to merge BPH with Pekao with the conditions that it would sell 200 of the 480 branches of BPH (acquired through HVB), sell the BPH brand and keep jobs at either Pekao or BPH for two years. The government instead would get people's recognition for securing jobs and for keeping BPH's name since it is one of the most well-known bank entities in the country.

This compromise was particularly made by the Polish government not to allow the collision of Pekao and BPH (owned prior to the merger by UCI and HVB respectively) to become the biggest retail bank in the country, thus hedging the state-owned bank's PKO position on the market. The Polish government had no authority in this case to impose any type of compromise since the merger was legal and officially determined not harmful for the Polish competition by the EU Commission authorities. The Polish Government could also find itself in court for interfering with a merger case that has community dimension and is out of its jurisdiction.

Overall the merger had the goal to cut costs from the duplication of activities in areas where both UCI and HVB were active, mostly in Poland where both banks had a big market share prior to the concentration. On the downside, the Polish government was right about the layoffs that are inevitable for such activity, but was able to postpone the wave of layoffs.

5.3.6. Conclusion

In conclusion, referring to this merger as Motta-Ruta do in their model, this is a domestic union merger - EU merger where the insiders are in two different countries of the union, and the market and the outsider in a third one, and there is the politically motivated government. The relation showing this is:

$$e_B^G = e_{\pi_O} \leq e_U^A = e_W \leq e_A^G = e_{\pi I}$$

In our specific case, the insiders UCI and HVB are in Italy and Germany respectively, while the market and the outsider are in Poland. Since the merger has a community dimension, there is one antitrust authority – the EU Commission.

Looking from the perspective of the efficiency gains of the merger, we know that if a merger is not efficient it would not be proposed by the insiders. Therefore $e < e_{\pi I}$ is the condition for the proposed merger. Also, the European Union Commission is the authority taking the final decision on the merger, but it is influenced by the politically motivated governments of the countries involved.

For values of the efficiency gains e such that $e \leq e_B^G = e_{\pi o}$ the German and Italian governments (the insiders' governments) as well as the EC authority do not oppose the merger and only the Polish government (outsider's government) intensively tries to block the merger. The merger will be approved with the probability ε_B.

A good proof of the fact that the Polish government was politically motivated in this merger is the conclusion on UCI-HVB merger of the Polish Office of Competition and Consumer Protection (OCCP) according to which after the merger neither bank will be in a monopoly position which would conflict with the principles of the free market.

Because the UCI-HVB merger had a community dimension it was out of the jurisdiction of the Polish competition authorities. However, due to this highly important merger case, the President of the OCCP decided to investigate, in June 2005, the financial services on the Polish market, the market structure, the degree of concentration, the competitive position of individual banks to the UCI-HVB merger as well as the effects of the merger on the local competition (OCCP, 2006).

In the course of its investigation, the OCCP did not find reasons to approach the EC on competitive matters related to the new merger and its effects on the Polish market. Likewise, the EC has thoroughly analyzed the potential effects of the concentration and decided to clear the merger.

Subsequently even if the government of Poland was against the merger and claimed it would have a negative influence on the competition and would cause job losses, we believe Motta-Ruta's conclusion was right namely that the Polish government was politically motivated and not consumer-welfare oriented. The European Union has a policy of taking into account the overall welfare, making sure that mergers that are beneficial to the union are not blocked by politically oriented governments. Naturally different governments have different positions on the merger, given that UCI and HVB have an asymmetric distribution on firms' assets and markets demands. The EC has analyzed the merger and got to the conclusion that even though the new concentration would be strong on the market, there is enough competition for it to face as well, therefore, it would not harm competition and comes in accordance with the competition rules.

5.4. Case 4: E.On/Endesa (International EU Merger)

5.4.1. Executive Summary

In the following section we will focus on this very controversial merger case that has failed not due to the European Commission (EC) decision, but due to other institutions' involvement in the matter. It is the proposed acquisition of the Spanish Endesa by the German E.On. It is a perfect example of economic nationalist protectionism where the government intervened in order to block a foreign company from taking over a local company. When it comes to the energy market it is a huge and complicated issue given that the electricity and gas sector is very concentrated in most national markets, it is not liquid and does not allow new entries, and it integrates very little within the EU Member States. We will see what has been done and who had most influence in blocking the merger even when the EU Commission has cleared it.

5.4.2. Case Background

5.4.2.1.Operation

On February 21, 2006, E.On announced its intention to launch a public tender offer for the acquisition of the entire issued share capital of Endesa, the offer being conditional upon the acquisition of at least 50.01% of Endesa's share capital. E.On plans, with the proposed acquisition of Endesa, to extend its activities into new geographic markets where it is currently not active, namely Spain and South America. The activities of both parties complement each other with regard to geographic markets, energy sources and market competence. The combination of their activities would help both companies to develop on the European markets, to increase their market integration and cross-border trading. E.On also believes that such a concentration will contribute to increasing energy reserves and security supply in the EU.

The result of this operation would give E.On sole control over Endesa. The initial offer of the energy giant E.On is an all-cash EUR 29.1 billion (27.50 EUR/share) for Endesa. If the merger passes the concentration will create the world's largest listed energy utility. E.On's market value of EUR 66.4 billion together with Endesa's will become a giant worth EUR 95 billion.

The E.On all-cash EUR 29 billion offer was made in February after in September 2005 Spanish energy company Gas Natural made a less appealing cash-on-share offer of EUR 22.4 billion (21.20 EUR/share) (Smedley, 2006).

Table 7. Timeline of E.On-Endesa Failed Merger

Date	Event
September 2005	Gas Natural makes hostile EUR 22 billion cash-on-share bid to acquire Endesa
February 3, 2006	Gas Natural's bid cleared by the Spanish Government with conditions
February 21, 2006	E.On announces intention of acquiring Endesa via tender offer
March 16, 2006	EC officially notified of E.On's intention
April 25, 2006	EC approves E.On bid
May 3, 2006	Infringement Procedures initiated by the EC against Spain
September 26, 2006	E.On increases offer to 35 EUR/share
January 10, 2007	Spain's court lifts key barrier to E.On-Endesa takeover
January 31, 2007	EC sues Spain on grounds of breach of international competition on the power market
March 16, 2007	EC sues Madrid again for holding illegal conditions on E.On-Endesa bid
February 1, 2007	Gas Natural drops bid for Endesa takeover
February 3, 2007	E.On makes second offer increase to 38.75 EUR/share (EUR 41 bln.)
March 26, 2007	E.On makes third/last offer increase to 40 EUR/share (EUR 42.3 bln.)
April 2, 2007	E.On backs out of the attempt to take over Endesa

Source:Author based on articles from www.factiva.com

5.4.2.2.Parties

E.On is a German energy company with main activities in the electricity and gas sectors. The Company's operations are organized into separate market units. The company's market is Europe and the United States, not Endesa's home market, Spain, though. The shares of E.On are listed on all German stock exchanges as well as on the New York Stock Exchange. The

Company's Energy Trading market unit combines its European trading activities for electricity, gas, oil and carbon dioxide allowances. The Company's New Markets segment consists of the activities of climate and renewables in Italy and Russia market units, as well as the Spain market unit (Factiva, 2010).

E.On is one of the world's largest private electricity and gas companies. In the summer of the year 2000 when by the tie-up of Veba and VIAG the new company named E.On was created. In 2003 it acquired 100 percent of Ruhrgas stock becoming Europe's third-largest gas company.

E.On is a well-focused company with leading market positions in electricity and gas, and nearly 30 million customers, it has a presence in over 30 countries.

Both the electricity and gas markets in the E.On pursued an integrated business model - from the power plant and the gas production to distribution and sales. It is one of geographically best-equipped generators in the world and has one of the most balanced generation portfolios in our industry. In the gas business, it has one of the most diversified regional reference portfolios. [20]

Endesa is a Spanish electricity operator, one of the largest electrical companies in the world and the first utility in Spain[21]. It is primarily involved in the electricity generation and distribution, gas supply and renewable energy production. Endesa SA is the parent of a number of controlled entities including Endesa Energia SA, Endesa Generacion SA, Endesa Red SA, Internacional Endesa BV and Endesa Servicios SL, among others. The Company is present on both national and international markets (Factiva, 2010). It is active, to a limited extent, in some European countries, namely: Portugal, France, Italy, Germany and Poland. Endesa also supplies electricity and related services in Spain, Portugal, Argentina, Brazil, Chile, Colombia, Peru and various European wholesale markets. Besides that, Endesa is also active in North Africa. Its shares are listed on the Madrid and the New York Stock Exchanges.

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[20] For more information on E.On see: www.eon.com
[21] For more information on Endes see: http://www.endesa.es/Portal/en/our_business/default.htm

Endesa was formed in 1944 as Empresa Nacional de Electricidad, S.A. and changed its name to Endesa, S.A. in 1997. In September 2004, it took control of the French company SNET (Société nationale d'électricité et de thermique) (Lab, 2006).

Table 8. Overview of Merging Parties (E.On-Endesa)

	E.On (2009)	Endesa (2009)
Profit	EUR 8.645 billion	EUR 3.430 billion
Common Outstanding Shares	1,905,456,820	1,058,752,117
Employees	88,227	26,305
Customers	17 million	23.45 million
Market	Present in over 30 countries: Central European, Pan-European, UK, Nordic and the U.S. Midwest market units. Not present in Spain.	Present in Europe, mostly in Portugal, France, Italy, Germany and Poland. Also present in South America and North Africa.

Source: Author based on 2009 E.On and Endesa company data extracted from www.factiva.com

5.4.3. EU Commission Decision

After a thorough analysis of the impact of the acquisition by E.On AG of the Endesa S.A. through a public bid, the EC did not get to the conclusion that there could be serious threats on neither domestic nor European competition in the energy (gas and electricity) industry and thus has decided on April 25, 2006 to clear the proposed operation.[22]

5.4.4. Competitive Assessment

5.4.4.1.Relevant Product Markets

In energy cases, the Commission has differentiated between two types of sectors: electricity and natural gas.

For the *electricity* markets, in the opinion of the notifying party and based on Commission precedents, there could be distinguished the following product markets: generation and wholesale supply; transmission; distribution and retail supply. As regards retail supply, a further distinction could be made between: large industrial customers connected to the high voltage grid and smaller industrial, commercial and domestic customers connected to the

[22] Commission Decision, 25 April 2006, Case No COMP/M.4110 - E.On / Endesa, Regulation (EC) No 139/2004.

low-voltage grid. However, some competitors and customers consider that since in some countries like France, Italy, Spain and Poland there is an ongoing liberalization process, it is appropriate to make a distinction between electricity retail supply to eligible customers having switched to the free market and eligible customers that have remained in the regulated market. This distinction is not necessary in countries like Germany that have a fully liberalized market.

For the *natural gas* markets there can be distinguished the following markets: wholesale supply, storage; transmission, distribution and retail supply. In particular, retail supply can be divided into the supply of natural gas to large industrial customers; to small customers and to electricity generation plants using combined cycle gas turbines. Regarding Germany E.On points out that two sub-segments should be distinguished with respect to the wholesale market: the market for the supply of gas to regional distribution companies and the supply to local distribution companies. E.On and Endesa are both active in electricity trading and in the market for emissions (carbon) trading. In past cases, the Commission has concluded that these markets constitute separate product markets.

5.4.4.2.Relevant Geographic Market

E.On sustains that electricity markets in Spain, Germany, Italy, France and Poland are at most national in scope. The same is applicable for the natural gas markets, where E.On is positive on the national scope of these markets for the same countries.

The CO_2 emission rights market is EEA-wide according to E.On, since all the Member States can be issued certificates and the prices are transparent. However the market is considered more EU-wide by the Commission, since not all the EEA countries are covered by the emission trading scheme.

Therefore, though the European Commission has left open the possibility of wider than national electricity markets, it considers that regardless of the alternative market definitions either for electricity markets or natural gas markets, the operation proposed does not give rise to competition concerns. Only for the CO_2 emission rights market the definition of the market scope is necessary.

5.4.4.3.Market Assessment

Given that the markets these two undertakings activate on are not overlapping in many points, the assessment focuses mostly on the effects of the proposed concentration on the five Member States (Germany, Spain, France, Italy and Poland) where their activity overlaps. Though E.On is not present on the markets in Spain, Endesa is predominantly present there.

In *Spain*, there are two main competitors in the electricity sector, Endesa and Iberdola. Endesa is the largest operator and holds a share of about 40% in electricity generation and wholesale and 33% of the installed capacity. Iberdola is the second in the same sector with 26% and 32% respectively. The natural gas market in Spain is lead by Gas Natural with 84% of the distribution market. Far behind Gas Natural in the retail supply market is Iberdola. Endesa is only a minor player on the market, acting through its subsidiary Carboex, with a 3% market share on the wholesale gas market. Endesa is not active in tank transportation of gas; therefore there is no proof that it would have any advantage on the Spanish market towards its competitors.

In *Germany* in the electricity sector, Endesa is only active in the retail supply to industrial customers, with a market share of <1%. In the German gas sector, E.On is active in the wholesale market, in transmission of natural gas, distribution over the local grid, storage and retail supply to large industrial customers, electricity generation plants and small customers. E.On does not produce natural gas in Germany. In the light of the above, the proposed transaction does not change E.On’s position in the natural gas sector in Germany, and therefore does not have a competitive impact on these gas markets.

In the electricity sector in *France*, Endesa is present via its subsidiary SNET, which accounted for <5% of the total installed capacity in France in 2004; whereas this was <5% in terms of generation. E.On has no presence in electricity generation in France. Both Endesa and E.On are active in the retail supply market. E.On has submitted that Endesa is not active in the French natural gas market and that, so far, it has no licence to supply or trade gas in France.

In *Italy*, E.On is not present in electricity generation when it comes to this sector, though its subsidiary Endesa Italy is present with a <10% share in terms of installed capacity. In the wholesale supply of electricity both are active, Endesa with about 5-15% and E.On with <5%. On the Italian natural gas markets, Endesa supplies its own power stations; the company does not supply to third parties. The market investigation has confirmed this. E.On Ruhrgas is only a small player, with a market share of <1% of total Italian production and import. E.On does not supply natural gas to Italian power plants. Given the very small increase in the joint activity of the concentration, and the small activity overlap in both natural gas, and electricity, the merger does not present competition concerns.

In *Poland* the companies who proposed the merger have a very low activity on the electricity and natural gas markets, below 1%; therefore the concentration does not present competition concerns.

Even in the electricity trading and CO_2 emission rights, the combined market share at EEA-wide level will not exceed 10%. Due to these low market shares and low probability of them increasing shortly, the merger does not present competition concerns.

5.4.5. Controversial Issues

The energy market mergers are generally highly controversial, because most of the times they involve the countries governments' protectionist behaviour duelling with the free market competition concepts. This is true especially for the energy companies. The governments generally try to protect the National Champions, even if it implies being against the well-known EC Merger Regulation. It has happened with other mergers in the EU and it is also the case of E.On's attempt to acquire Endesa through a tender offer.

When E.On made its EUR 29.1 billion bid to aquire Endesa's shares, there was a restructuring planned on the European energy market, and different companies where trying to increase their power by acquiring other companies in the field. Usually the bigger European energy companies were trying to acquire the smaller and poorer managed energy companies. In this series of acquisition attempts all over Europe, the German E.On has made a good offer to the Spanish Endesa. However, E.On's attempt to acquire Endesa did not fit into Spanish government's plans since the concentration would create the biggest company worldwide and the Spanish government would have no say in the future of Endesa. Not speaking from the concentration's dimensions, but from its potential monopolistic position after the merger, it would not be a monopolist and would not impede competition in EEA or other areas for that matter. On the contrary, the two companies have complimentary markets, overlapping just slightly in a few countries-France, Italy, Germany and Poland (European Commission, 2006b). Therefore their merger would only come to the benefit of extending both companies' markets as well as to liberalisation of the European energy market.

Either way, the Spanish government hoped for another Spanish energy company Gas Natural to come with a better offer in order for its offer to be accepted rather than E.On's.

Gas Natural did have most of its market in Spain, so its activity would overlap with Endesa's and would create a monopolist on the market. That would impede other energy companies from entering the local market, thus presenting anti-competitive threat. The Spanish government has backed the offer of Gas Natural (DW and AFP, 2006b) although due to competition reasons it would have to be restricted in the first place. As a result, the EU Commission declared the merger of Gas Natural and Endesa not of community dimension, i.e. it was the responsibility of the Spanish competition authorities to be decide[23]. The Spanish authorities have decided to allow the Gas Natural-Endesa merger only with structural remedies that implied selling the divestitures at auction in case the merger took place (Pacheco and Ordiozola, 2008). This decision has been elaborated and the offer was about to be presented to Endesa shareholders when E.On came up with its hostile offer.

The following months after E.On placed its bid to acquire Endesa, Spanish government has gotten into action mode against the merger. Besides the fact that National Commission on Securities Market (CNME-Comision Nacional del Mercado de Valores) was investigating the increase in share price of Endesa prior to the bids made by E.On and Gas Natural (Echikson, 2006), Spain has made a Decree-law according to which the National Energy Commission (CNE-Comision Nacional de Energia) gets full power in deciding which acquisition is to be allowed on the Spanish energy market if the intended acquisition stake is higher than 10%. In other words, CNE had more decision power on the Spanish energy companies' acquisition

[23] Regulation (EC) No 139/2004 Merger Procedure, Declaring the lack of Community dimension
Date: 15/11/2005 , Case No COMP/M.3986 – Gas Natural/Endesa

than the European Commission, even when the mergers have Community dimension and the EC has already cleared the merger (EUREGY, 2006).

This situation initiated a series of legal actions. The EC warned Spain that it had no right to block a merger cleared according to the EC Merger Regulation. Anytime a country's government does not agree with the EC decision on certain M&A issues, it should address the subject and appeal the decision in Brussels, and not make national laws that come against the EU regulation. Thus, the infringement procedure against Spain was inevitable. Since the newly-created CNE fails to comply with the EU Commission's Regulation that says "member states should not be permitted to apply their national legislation on competition to concentrations with a Community dimension" (EUREGY, 2006) EU Commission has given Spain, through a formal letter on the subject, two months to explain the decree (AGEU, 2006). Along with Spain, a total of 17 countries have received the letter at the beginning of April 2006 according to which, any failure to comply with the EU regulation and any attempt to economic nationalism, as in this case, could lead to legal proceedings (IFL, 2006). In a decision on April 4, 2006 the Commission granted Neelie Kroes, the Competition Commissioner, full power to act on its behalf in requesting that the CoJ (Court of Justice) impose preliminary precautionary measures. E.On, on the other hand, could then appeal to a Spanish court to demand compensation form the Spanish government for damages (EUREGY, 2006).

Even with this warning, Spain failed to comply. The CNE made up a list of 19 conditions that E.On would have to follow in order to be able to acquire Endesa. These conditions were made-up so that the acquisition would not be viable for E.On and it would drop the bid. Some of these conditions were to conserve Endesa's brand for another five years after the completion of the concentration, use coal at power stations and not sell certain of Endesa's assets. Also CNMV came up with some restrictions that would make the merger unprofitable for E.On. Even though E.On agreed with some of the conditions, EC started infringement procedures due to illegality of these conditions. Though the Spanish government lifted the block on the E.On-Endesa merger, the CNE did not lift any of its conditions claiming that it is for security reasons (AGEU, 2006).

All the while more than a year E.On was trying to acquire Endesa through its bid, and because of the legal procedures it was not going through, Italian company Enel and Spanish Constructions Company Acciona managed to buy, outside a certain bid, stocks at Endesa, by 2007 managing to have a common stock of 46% of the shares. By the time E.On already had made three raises to the initial bid, offering the last time 40 EUR/share (EUR 42.3 billion), it realized that it would not be possible to buy a majority stock at the Endesa, so it decided to drop the bid on April 2, 2007. Even before this, on February 1, 2007, Gas Natural also dropped its bid for Endesa.

However, in this turn of events, E.On still got to take something out of the more than one year long merger attempt, even if it was not what it initially made the offer for. Before dropping the bid, Enel and Acciona offered an even higher bid (41 EUR/share) for Endesa, even if E.On was still in its bid acceptance period. In this way, E.On not having other choice to acquire Endesa, decided to agree on certain terms with the two companies, Enel and Acciona, to allow it to acquire at least a part of Endesa. It ended up spending EUR 10 billion (Johnstone, 2007) on about 9.9% of the company. Italian company Enel with Spanish company Acciona jointly made a bit and became the new acquirers of Endesa.

As it is often mentioned “capital is particularly apt to flow when governments get out of the way” (WSJE, 2007). The EC maintained its position in protecting the competition in the energy sector as well as the single-market ideology when it came to E.On-Endesa case. Along with the public denial of the Spanish government that was trying to pretend they will back mergers that do not threaten local as well as European competition (Smedley, 2006), it tried to back Gas Natural’s merger in order to keep alive their political support.

5.4.6. Conclusion

This is a case of cross-border EU merger where there are two insiders in two different European Union countries and the competition authority is the European Commission. What Motta-Ruta have shown in their theoretical model is that politically motivated governments’ goals are first and foremost to lobby in favour of their favourites, in exchange for political contributions, and not in favour of enforcing competition rules and protecting consumers. Insider 1, E.On is in Germany (country B) and wanted to take over insider 2 Endesa in Spain (country A). The outsiders are in Spain and the market is also in Spain but mostly Europe. The motivated government is the Spanish one, who wanted to have a National Champion in the energy sector and to forbid foreign acquisition.

The general relation showing this situation is: $e_A^G = e_{CS} = e_{\pi_o} < e_U^A = e_B^G = e_{\pi_I}$.

The politically motivated government lobbies against the merger creating a new national authority that has the power to clear or overturn mergers that would have more than 10% of the local market. The case of E.On and Endesa is when a foreign company, insider 1, outbids the outsider. The politically motivated government will oppose the efficient merger because it supports the local outsider.

For values of the efficiency gains *e* such that $e \leq e_A^G = e_{CS} = e_{\pi_O}$ the union authority and the acquirer's government endorse the merger and the government of the insider in Spain opposes the merger. In this case the merger is approved with probability 1.

Even with Community dimension and EC clearing the merger, the government imposes several conditions that are difficult to be respected by the proposed concentration. The Spanish government also lobbies for another company's takeover of insider 2 (Endesa) to be cleared, the Spanish outsider Gas Natural. This preferred merger would create a local monopolist thus creating serious entry problems for new companies, i.e. creating competition threats. However the Spanish government supports it because it has Gas Natural support.

As we see, even with the EC intervention in attempt to apply Merger Control Regulation, the acquisition of cross-border companies is a complicated long process that once it started it is never known how it will end. The liberalisation of the energy market was always even more complicated than the acquisition of giants by "foreign" acquirers. National protectionism is a major factor that causes great hindrance. The nationalist governments instead of deciding on market competition basis, they decide on the matters of who is supposed to have the power in the energy (electricity and gas) sector, even if in this particular case it was not for them to decide.

The Spanish government was the holder of the "Golden Share" in Endesa, and though they have promised not to use it, they have come up with other ways of blocking the merger (DW and AFP, 2006a). Spain preferred to have a National Champion, i.e. keep its influence in the local energy sector. The Spanish government had backed the Gas Natural-Endesa merger proposed, and even though this eventually did not happen, Spain managed to drag on the E.On attempt to take over Endesa so that from above-mentioned reasons their merger did not take place.

6. SUMMARY AND CONCLUSIONS

In this thesis we have proposed ourselves to give an insight on the controversial issues of merger cases and the political environment in which they took place as well as an overview of the important improvements brought with the 2004 ECMR Reform.

In the second chapter we referred to the origins and evolution of the European Merger Control. The twenty-years from the first Community-wide effective Merger Regulation brought about many improvements to the regulations, especially with the ECMR 2004 Reform. Some of the major improvements were the lower thresholds for Community dimension, more academic economists involved in the merger assessment and the introduction of the previously-prohibited “efficiency defence”.

The third chapter of the thesis covered an outline of the main procedures of the merger case assessment according to the ECMR as well as the thresholds by which the EC decides if the merger falls under its jurisdiction or the one of NCAs. We briefly presented the collusion hypothesis, or the coordinated effects, its reflection in the HMG and some rationing about the actual impact of the collusion hypothesis. And finally, we referred to the discrepancies that can arise between markets and regulators if stock market anticipation is used. According to the empirical results in the papers studies, the factors that lead to discrepancies are the political economy of merger control, the lack (before 2002) of the “efficiency defence” clause in the Merger Regulation and the short periods of phase I and phase II of the ECMR procedures. In 2004 the last two have been implemented, namely the “efficiency defence” clause was introduced, and the merger evaluation time has been extended.

For our actual analysis we took four of the most controversial cases, analyzed them thoroughly and reached a conclusion for each case separately according to the model of Michele Ruta and Massimo Motta in the paper “A Political Economy Model of Merger Policy in International Markets” (2008) presented in the fourth chapter of this thesis.

The analysis carried out in the fifth chapter lead us to particular conclusions. Therefore, we can state that in all the four cases analyzed there was a great degree of political involvement from various reasons, generally coming down to the governments’ desire to create a ‘national champion’ – a powerful player on the market capable of competing with international giants, or to keep its influence in certain economic areas of their countries hindering normal market evolution.

Referring to each case in particular, we can conclude that though by the time E.On-Ruhrgas merger has been announced and was being cleared and blocked on several occasions, the ECMR did not cover certain detailed situations regarding mergers that would stop firmly such types of occurrences and this concentration in general to begin with. The lack of a German energy competition regulator at the time of the merger left the merger under the FCO jurisdiction that was undermined by the German government's right to veto its decision. The whole case ended up being decided by the German government and E.On's ability to arrange out-of-court settlements with the companies that placed complaints against and tried to block the merger. To speak from the efficiencies point of view, this merger was definitely one profitable for the merging parties, not so much for the end user though, since by being the biggest player on the German energy market, and not only, it was due to increase prices and leave less chances for new companies to enter the energy market.

In the case of the American merger Boeing-MDC, the situation was a bit different namely because it involved two antitrust authorities – the FTC who allowed the merger based on its efficiencies, and the EC that was lobbied by the governments of the countries members of in the Airbus consortium to block it since it would strengthen its already dominant position on the world aircraft production market and Airbus will fall behind on competition since it does not provide the full range of products to be offered by the new concentration.

Italy's Unicredit successful attempt to acquire German HVB is a pure example of a government's involvement in the course of the economy of its country. The position on the Polish market created by the concentration was not due to undermine competition since the diverse banking industry was able to keep healthy competition even with the new leader on the market created by the two merged banks. However, the Polish government tried by all means to keep its influence in the pre-merger biggest bank on the Polish market. This kind of governmental intrusion in the national economy and noncompliance with the EU Merger Regulation was by far not the only case among European mergers. This phenomenon was present in the E.On-Endesa case as well.

E.On's failed acquisition of Endesa was also a result of Spanish government's desire to keep its influence in the energy sector to the detriment of potential market efficiencies. The Spanish government went against the EC decision to allow the merger. Instead, it supported a local merger of Endesa with Gas Natural, concentration that was due to be blocked by the Commission since it would create a dominant position on the Spanish market.

Three of the four cases also provide a great proof of the fact that foreign acquirers are scrutinized more than the local ones. For example, Boeing's acquisition was under FTC jurisdiction, but got to have serious involvement from the EC and not on competition basis. Unicredit's acquisition of HVB on the Polish market would create the biggest however competitive player, but is scrutinized by the Polish government. Endesa's acquisition by E.On failed due to the fact that E.On was not Spanish and the Spanish government imposed so many conditions to the case that it got to a point that it became unattractive for E.On to honor the offer.

The contribution with this thesis is the hundreds of read online newspaper articles covering the four controversial mergers cases through their procedural periods, some of which took two-three years to be completed. This gave a great perception of the political environments in which the mergers took place at the time they happened. It also helped read more objectively through the facts and present the cases as accurately as possible herein. We believe the cases chosen are relevant to show the gaps in the pre-2004 ECMR, the continuous hardships of the companies to merge and of the European Commission to assess objectively and endorse or prohibit certain concentrations. We found Motta and Ruta (2008) research just as valuable for this thesis serving as the core of this paper, as it is for future researches to be done in the area of political economy of the mergers.

My suggestions to Merger Control law makers on what can be improved in the merger regulation is to continue assessing the ex-post effects of the mergers cleared or cleared with remedies to determine the factors that influence most the discrepancies and to implement legislative regulations that would allow a more objective appraisal of future mergers. Regarding the political involvement, I would suggest to enforce even more strict measures to the institutions that hinder the decision making process of the competition authorities, be they Community or National authorities.

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Internet Sources

http://ec.europa.eu/competition/index_en.html

http://factiva.com/

Appendix 1. European Mergers Statistics (21/09/1990 to 30/06/2010)

Table 9. Number of Notifications

I) Notifications	Number of Notified Cases	Cases Withdrawn Phase I	Cases Withdrawn Phase II
1990	11	0	0
1991	64	0	0
1992	59	3	0
1993	59	1	1
1994	95	6	0
1995	110	4	0
1996	131	5	1
1997	168	9	0
1998	224	5	4
1999	276	7	5
2000	330	8	5
2001	335	8	4
2002	277	3	1
2003	211	0	0
2004	247	3	2
2005	313	6	3
2006	356	7	2
2007	402	5	2
2008	347	10	3
2009	259	6	2
6/10	127	1	0
Total	**4401**	**97**	**35**

Source: Author based on European Commission Competition (2010) available at:
http://ec.europa.eu/competition/mergers/statistics.pdf

Table 10. Number of Referrals 1990-2010

II) Referrals	Art 4(4) request (Form RS)	Art 4(4) request to Member State	Art 4(4) partial referral to Member State	Art 4(4) refusal of referral	Art 4(5) request (Form RS)	Art 4(5) referral accepted	Art 4(5) refusal of referral	Art 22 request	Art 22(3) referral (Art 22.4 taken in conjunction with article 6 or 8 under Reg.4064\89)	Art 22(3) refusal of referral	Art 9 request	Art 9.3 partial referral to Member State	Art 9.3 full referral	Art 9.3 refusal of referral
1990								0	0		0	0	0	0
1991								0	0		1	0	0	1
1992								0	0		1	1	0	0
1993								1	1		1	0	1	0
1994								0	0		1	1	0	0
1995								1	1		0	0	0	0
1996								1	1		3	0	3	0
1997								1	1		7	6	1	0
1998								0	0		4	3	1	0
1999								0	0		9	2	3	1
2000								0	0		4	3	2	0
2001								0	0		9	6	1	0
2002								2	2		8	7	4	0
2003								1	1		1	1	8	1
2004	2	2	0	0	20	16	2	1	1		4	1	2	0
2005	14	11	0	0	28	24	0	4	3	1	7	3	3	0
2006	13	13	0	0	38	39	0	4	3	1	6	1	1	0
2007	5	5	1	0	51	50	2	3	2	0	3	1	1	1
2008	9	9	0	0	23	22	0	2	3	0	5	2	2	0
2009	8	6	0	0	23	25	0	1	1	0	3	0	1	1
6/10	4	6	0	0	14	10	1	1	1	0	5	1	3	0
Total	**55**	**52**	**1**	**0**	**19**	**186**	**5**	**23**	**21**	**2**	**9**	**39**	**37**	**5**

Source: Author based on European Commission Competition (2010) available at:
http://ec.europa.eu/competition/mergers/statistics.pdf

Table 11. Number of First Phase Decision and Phase II Proceedings Initiated

III) First Phase Decisions	Art. 6.1 (a) out of scope Merger Regulation	Art. 6.1 (b) compatible	Art 6.1 (b) compatible, under simplified procedure (figures included in 6.1 (b) compatible above)	Art 6.1 (b) in conjunction with Art 6.2 (compatible w. commitments)	IV) Phase II Proceedings Initiated	Art 6.1 (c)
1990	2	5	0	0	**1990**	0
1991	5	47	0	3	**1991**	6
1992	9	43	0	4	**1992**	4
1993	4	49	0	0	**1993**	4
1994	5	78	0	2	**1994**	6
1995	9	90	0	3	**1995**	7
1996	6	109	0	0	**1996**	6
1997	4	118	0	2	**1997**	11
1998	4	196	0	12	**1998**	11
1999	1	225	0	16	**1999**	20
2000	1	278	41	26	**2000**	18
2001	1	299	141	11	**2001**	21
2002	1	238	103	10	**2002**	7
2003	0	203	110	11	**2003**	9
2004	0	220	138	12	**2004**	8
2005	0	276	169	15	**2005**	10
2006	0	323	211	13	**2006**	13
2007	0	368	238	18	**2007**	15
2008	0	307	190	19	**2008**	10
2009	0	225	143	13	**2009**	5
6/10	0	111	62	9	**6/10**	2
Total	**52**	**3808**	**1546**	**199**	**Total**	**193**

Source: Author based on European Commission Competition (2010) available at: http://ec.europa.eu/competition/mergers/statistics.pdf

Table 12. Number of Second Phase Decisions and Other Decisions

V) Second Phase Decisions	Art 8.1 compatible (8.2 under Reg. 4064/89)	Art 8.1 compatible with commitments	Art 8.3 prohibition	Art 8.4 restore effective competition	VI) Other Decisions	Art 6.3 decision revoked	Art 8.6 decision revoked	Art 14 decision imposing fines	Art 7.3 derogation from suspension (7.4 under Reg. 4064/89)	Art 21
1990	0	0	0	0	**1990**	0	0	0	1	0
1991	1	3	1	0	**1991**	0	0	0	1	0
1992	1	3	0	0	**1992**	0	0	0	2	0
1993	1	2	0	0	**1993**	0	0	0	3	0
1994	2	2	1	0	**1994**	0	0	0	3	0
1995	2	3	2	0	**1995**	0	0	0	2	1
1996	1	3	3	0	**1996**	0	0	0	4	0
1997	1	7	1	2	**1997**	0	0	0	5	1
1998	3	4	2	0	**1998**	0	0	1	13	0
1999	0	7	1	0	**1999**	1	0	4	7	1
2000	3	12	2	0	**2000**	0	0	1	4	1
2001	5	9	5	0	**2001**	0	0	0	7	0
2002	2	5	0	2	**2002**	0	0	1	14	1
2003	2	6	0	0	**2003**	0	0	0	8	0
2004	2	4	1	0	**2004**	0	0	1	10	0
2005	2	3	0	0	**2005**	0	0	0	6	0
2006	4	6	0	0	**2006**	0	0	0	2	2
2007	5	4	1	0	**2007**	0	0	0	3	1
2008	9	5	0	0	**2008**	0	0	0	6	0
2009	0	3	0	0	**2009**	0	0	1	5	0
6/10	1	0	0	0	**6/10**	0	0	0	1	0
Total	**47**	**91**	**20**	**4**	**Total**	**1**	**0**	**9**	**107**	**8**

Source: Author based on European Commission Competition (2010) available at: http://ec.europa.eu/competition/mergers/statistics.pdf

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